

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO.

DAVID REIMER RYAN

MOVANT

V. MOTION FOR DISCRETIONARY REVIEW

SUSAN MARIE RYAN (NOW BISIG)

RESPONDENT

Respectfully submitted:

Edwin F. Kagin
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Attorney for Movant
David Reimer Ryan

CERTIFICATE OF SERVICE

The undersigned does hereby certify that true copies of this Motion were served upon the following named individuals by first class mail, postage prepaid, on the ____ day of May, 2009: Sam Givens, Clerk of the Court, Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, KY, 40601-9229; Sandra G. Ragland, Esq., 623 West Main St., Louisville, KY 40202, attorney for Respondent.

Edwin F. Kagin

May It Please The Court:

Comes now the Movant, David Reimer Ryan, by and through the undersigned counsel, and, for his Motion for Discretionary Review of the Opinion of the Kentucky Court of Appeals in this action, and in conformity with CR 76.20, states as follows:

1. The Movant, David Reimer Ryan, does hereby move the Kentucky Supreme Court for discretionary review of the final disposition entered by the Kentucky Court of Appeals on the 24th Day of April, 2009 in the above styled civil action.

2) The name of the Movant is: David Reimer Ryan.

3) The name and address of Movant's counsel is:

Edwin F. Kagin

10742 Sedco Drive

P.O. Box 559

Union, KY 41091

4) The name of Respondent is: Susan Marie Ryan (now Bisig).

5) The name and address of Respondent's counsel is:

Sandra G. Ragland, Esq.

623 West Main St.

Louisville, KY 40202

6) The Court of Appeals case number is: NO. 2008-CA-000858-MR.

A copy of the ruling of the Court of Appeals is filed herewith as an exhibit.

7) No supersedeas bond, or bail on appeal, has been executed.

8) The material facts involved in this action are that Movant (hereinafter "David") is an Atheist and the Respondent (hereinafter "Susan") is a Roman Catholic. Susan wishes to have the child of the parties (hereinafter "Michael") sent to a Roman Catholic parochial religious school run by the Roman Catholic Church.

The trial judge refused to recuse himself upon proper request by David. Had the only relevant fact been that the Judge is a Roman Catholic, David would not have been so petty as to have requested recusal. However, the Judge is not only a Roman Catholic, he is a member of St. Aloysius Church, the same church that Susan attends, and the church that operates the religious school to which Michael was previously being sent under the order of the Court. He is an elected judge, and David is an Atheist. Under these facts, David alleged an appearance of impropriety which he believes, under our laws and canons, requires recusal. It is, David believes and asserts, a fact situation "...in which the judge's impartiality might reasonably be questioned."

Kentucky Code of Judicial Conduct, Canon SCR 4.300 (3) (E).

David and Susan have joint custody of Michael. David wants Michael to be sent to a fine secular school to which he has been admitted and to which Susan has no constitutional objection. David strongly objects, under Section 5 of the Kentucky

Constitution, on reasons of conscience, to having Michael attend a religious school. David testified at length under oath to the fact that he, an Atheist, was “conscientiously opposed” to being “compelled” to send his child to a religious school. The proof also showed, without contradiction, that the mandatory belief system to which Michael would be subjected, in a Roman Catholic school, teaches in its Catechism, *inter alia*, that an atheist, like Michael’s father, should be denounced and rejected as “a sinner.”

The record of the hearing will clearly reveal that the trial Judge, in his questioning of Susan, seemingly sought to elicit from her a statement that she was conscientiously opposed to sending Michael to the excellent secular “Louisville Country Day” private school to which he had been admitted. When this attempt failed, the Judge nevertheless included in his findings the incorrect implication that Susan had also invoked a constitutional right not to send her child to a secular school. Susan’s counsel repeated this misstatement of what actually happened, and the error was adopted as fact by the Court of Appeals.

The judge neither ruled on the question presented to him of which school Michael should attend, nor did he disturb the joint custody arrangement. Instead, he modified the joint custody law by giving Susan the power to decide, over David’s Constitutional objection, which school Michael should attend, knowing full well that she would send Michael to the Roman Catholic religious school.

David appealed, and the Court of Appeals, without benefit of oral argument, and in an opinion ordered “Not to be Published” Affirmed.

9) The questions of law involved in this action are:

Should this Honorable Court revisit, and perhaps reconsider, the present state of the law on joint custody in Kentucky as articulated in *Fenwick v. Fenwick*, 114 S.W.3d 767 (Ky. 2003) and in *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008)?

Did the Court of Appeals err in failing to find, given the facts of this case, that the trial Judge should have recused himself?

Did the Court of Appeals err by begging the question with a “break the tie” rationale that permitted the trial court judge to create a non-existent exception to the joint custody law of Kentucky rather than ruling on the issue of which school Michael should attend in the manner mandated by the Kentucky Constitution?

Did the Court of Appeals err by looking for guidance to the laws of other states that do not provide the constitutional protection provided David by Section 5 of the Kentucky Constitution, which states, in pertinent part, “...nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed?”

Whether Section 26 of the Kentucky Constitution required the Court of Appeals to enforce David’s contention that Section 5 of the Kentucky Constitution prohibits him from being forced to send his son to a school to which he is

“conscientiously opposed” when it states “To guard against transgression of the high powers which we have delegated, We Declare that every thing in this Bill of Rights is excepted out of the general powers of government, and shall forever remain inviolate; and all laws contrary thereto, or contrary to this Constitution, shall be void.”

Whether David was denied basic due process of law and equal protection of the Laws.

Should the Court have erred, if at all, on the side of the Constitution and not on the side of the church?

- 10) The Judgment of the Court of Appeals should be reviewed because the Court erred by entering, in a case of first impression, without benefit of oral argument, an opinion “not to be published” that bypassed a core recusal issue, that amended a statute of Kentucky, and that ignored a section of the Bill of Rights of the Commonwealth of Kentucky.

The Judgment of the Court of Appeals should be reviewed because, if the Court of Appeals wishes to make a ruling respecting an establishment of religion, in violation of the 1st Amendment to the Constitution of the United States, and in violation of Sections 5 and 26 of the Constitution of Kentucky, by holding, when David asserts his right under Section 5 of our Constitution that he cannot be forced to send his child to a religious school to which he is conscientiously opposed, that David can be forced to send his child to a religious school to which he is conscientiously

opposed, it is respectfully submitted that such an analysis should be rendered in a published opinion where history can judge how well the authors thereof fulfilled the high duties entrusted unto them.

The Judgment of the Court of Appeals should be reviewed because a clarification is needed concerning whether or not, as the trial judge apparently concluded, and as the Court of Appeals apparently affirmed, the “best interests of the child” standard can “trump” David’s rights under the black letter holdings of Section 5 of the Kentucky Constitution, and Section 26 of the Kentucky Constitution, which say in unambiguous language that neither legislative statutes, nor judicially made interpretations, can void the constitutional provisions relied upon by David herein.

- 11) The movant does not have a petition for rehearing or a motion for reconsideration pending in the Court of Appeals.

- 12) No other party to this proceeding has a petition for rehearing or a motion for reconsideration pending in the Court of Appeals.

Respectfully submitted:

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