

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000858-MR

DAVID REIMER RYAN

APPELLANT

v.

APPEAL FROM OLDHAM FAMILY COURT
HONORABLE TIMOTHY E. FEELEY, JUDGE
ACTION NO. 97-CI-00375

SUSAN MARIE RYAN (NOW BISIG)

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE AND NICKELL, JUDGES; KNOPF,¹ SENIOR JUDGE.

NICKELL, JUDGE: David Ryan (David) has appealed from the Oldham Family Court's April 11, 2008, findings of fact and conclusions of law which granted his ex-wife, Susan Ryan (now Bisig), sole custody of their minor son for the limited

¹ Senior Judge William L. Knopf 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.

purpose of educational decision making. On all other matters, David and Susan share joint custody. For the following reasons, we affirm.

David and Susan were married on October 7, 1989. The marriage produced one son who was born in 1994. Both parties are competent and caring parents who do not speak negatively about each other and have worked well together in the upbringing of their son. The parties were divorced by a decree of dissolution of marriage entered on November 5, 1997. A property settlement agreement was entered providing for the creation of a fund for their child's educational expenses. With the consent of both parties, the child was enrolled at St. Aloysius Elementary School, a private Catholic parochial school sponsored by the church Susan and David attended during their marriage.

Over several years' time, the parties returned to the Oldham Family Court for resolution of tax, child support, and visitation issues about which they could not agree. No dispute was raised as to the child's attendance at the parochial educational institution. In March 2005, in response to a question regarding the child's continued education at St. Aloysius, David informed the Court that "St. Al's is fine." However, in August 2005, David began to express concerns regarding the quality of education the child was receiving and what he perceived as "religious indoctrination." During a hearing that month, the trial court *sua sponte* informed the parties he was a parishioner of St Aloysius and had formerly served as a member of the Board of Education for Oldham County Public Schools. The trial court further stated he believed this qualified him to assess the quality of both

schools. In its order entered August 10, 2005, the trial court noted a decision would have to be made at the end of the child's eighth grade year on whether he would continue in parochial schooling or move to the public school system.

On August 21, 2006, the trial court appointed a parenting coordinator, Mitch Charney, to resolve disputes regarding the parties' parenting schedule. At the initial meeting with Charney, Susan described herself as being of the Roman Catholic faith and David identified himself as a "middle-of-the-road Protestant." Following the initial meeting, Charney referred the couple to a therapist, Alison Johnson, to assist them in resolving their conflicts. Numerous counseling sessions with Johnson and meetings with Charney ensued. However, the parties were unable to resolve all of their differences.

On December 17, 2007, as the child neared the middle of his eighth grade year, David filed a motion requesting voluntary recusal of the trial judge, reassignment of the case to a different judge, and an order requiring the child to attend a secular school. David indicated for the first time that he was an atheist and was "conscientiously opposed" to sending his son to "a sectarian school of any nature." On January 3, 2008, Susan moved the court to order a custodial evaluation. On January 4, 2008, the trial court denied David's motion for recusal and set a date for a hearing on the secular school issue. On January 25, 2008, the trial court denied Susan's motion for a parenting assessment. On March 5, 2008, Susan moved the court to award her sole custody of the minor child. On March 7, 2008, David filed a response in opposition to Susan's motion for custody

modification and moved the court for sanctions against Susan and her counsel, alleging her motion had been brought in bad faith.

A hearing on David's motion regarding the child's schooling was convened on April 2, 2008. The trial court heard testimony from David, Susan, Charney, Johnson, and David's expert witness, Dr. Edwin Buckner.

Charney testified the child wished to attend high school at St. Xavier High School (St. X) and opined the familiar environment would be beneficial to the child's well-being, whereas a substantial change in his school environment would be detrimental. He stated it would be better for the child if the court determined which school he would attend rather than his parents as this would alleviate him being torn between his parents' conflicting views.

Dr. Buckner testified regarding his research and analysis among St. X, Kentucky Country Day (KCD) and South Oldham High School, the three schools in which the child would potentially be enrolled. He opined that religious education was a form of child abuse and that such schools tended to indoctrinate rather than educate. Without meeting or interviewing the child, Dr. Buckner stated his belief that the child would be best served by attending KCD. He further opined that if KCD were not an option, South Oldham High School would be a superior choice to St. X as he believed secular education was always better than parochial education, regardless of the academic performance differences of the students at such schools.

Johnson testified the child preferred to attend St. X with his friends. Although she believed he could manage the transition to any new school, she also believed the transition would be difficult and could cause problems. Johnson testified the child was frustrated by his perception of being unable to satisfy his father's expectations. Finally, Johnson testified the child should be allowed to have his opinion considered in the choice of his schooling and recommended he attend St. X as he requested.

David testified to being an atheist his entire life and being conscientiously opposed to sending his son to parochial schools. He testified he believed secular schools were in every way superior to parochial schools and he was opposed to any and all religious schools. He stated his son's first preference was to attend high school at St. X, followed by KCD, and lastly South Oldham, but noted religion was not a high priority with his son in choosing St. X. He testified about a detailed analytical grid he compiled with his son to compare the different schools. While David stated he believed the wishes of children should be considered, he ultimately believed decisions should be made by adults. Finally, David argued that forcing him to send his son to a school to which he was conscientiously opposed would amount to a violation of his rights under Section 5 of the Kentucky Constitution.²

² Section 5 of the Kentucky Constitution states in part, “. . . nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed. . . .”

Susan testified she was unaware David was an atheist before or during their marriage and was only informed of David's beliefs a short time before David moved the court to send their son to a secular school. She stated their son had been enrolled in the Catholic school system with David's consent and he had never objected to the school on religious grounds although he had complained about some disciplinary and academic matters. She stated it was her understanding she and David had agreed to send their son to a parochial high school when they set up an education fund. Finally, she stated the child had voiced a strong desire to attend St. X over any of the other schools.

At the conclusion of the hearing, the trial court denied Susan's motion to modify custody and David's motion for sanctions. On April 11, 2008, the trial court entered its thorough written findings of fact and conclusions of law, opining that the child's best interests would be best served by granting Susan sole custody for the limited purpose of making educational decisions. The trial court found Dr. Buckner to have been obviously biased "as he testified that he was in agreement with the philosophy that indoctrination of children in a religious belief constitutes a form of child abuse." Further, the two witnesses who had actually met with the child, Charney and Johnson, recommended he attend St. X, and both parents agreed the child desired to attend that institution for reasons other than religion alone. The sole reason presented for not sending the child to St. X was David's conscientious objection. The trial court ruled it could not compel David to send his child to a religious school, nor could it prohibit Susan from doing so. Therefore, as

the parties were at an impasse and the trial court could not infringe on the constitutional rights of either party, it ordered Susan to have sole decision-making authority regarding the child's education. If Susan determined the child would attend a religious school, she would bear the entire expense of such education. However, if she decided to send the child to a public or secular school, the costs thereof were to be divided equally between the parties.³ This appeal followed.

David contends the trial court erred in failing to recuse itself on the grounds of perceived bias, rejecting the expert testimony of Dr. Buckner, and granting Susan sole custody for purposes of making educational decisions. After a careful review of the record, we affirm the decision of the trial court.

RECUSAL

David first argues the trial court erred in failing to recuse itself from this matter based on the appearance of bias stemming from the trial court's membership in the St. Aloysius parish. In support of his argument, David cites to the Kentucky Code of Judicial Conduct which requires a judge to recuse himself when "the judge's impartiality might reasonably be questioned." SCR⁴ 4.300(3)(E). David alleges the appearance of possible bias was sufficient to require the trial court to remove itself from further consideration of this matter.

We disagree.

³ It is important to note that the cost of the child's schooling is not in issue before this Court. Thus, we express no opinion as to the propriety of the trial court's order regarding the division of payment for such expenses.

⁴ Rules of the Supreme Court.

Recusal is required under KRS 26A.015(2)(a) and (e) when a judge has “a personal bias or prejudice concerning a party” or “[w]here he has knowledge of any other circumstances in which his impartiality might reasonably be questioned.” *See also* SCR 4.300 Canon 3C(1). “The burden of proof required for recusal of a trial judge is an onerous one. There must be a showing of facts ‘of a character calculated seriously to impair the judge’s impartiality and sway his judgment.’ *Foster v. Commonwealth*, 348 S.W.2d 759, 760 (Ky. 1961), *cert. denied*, 368 U.S. 993, 82 S.Ct 613, 7 L.Ed.2d 530 (1962); *see also Johnson v. Ducobu*, 258 S.W.2d 509 (Ky. 1959).” *Stopher v. Commonwealth*, 57 S.W.3d 787, 794 (Ky. 2001). A simple allegation of prejudice on the part of the judge is insufficient, *Foster, supra*, as is the mere belief the judge cannot be fair or impartial. *Bissell v. Baumgardner*, 236 S.W.3d 24, 29 (Ky. App. 2007). David has failed to meet his burden in this matter.

David cites to adverse rulings contained in the record to support his claim that the trial court exhibited bias in this matter, but otherwise offers only speculation and conjecture in his attempt to establish “the appearance of possible bias.” Our review of the record discloses no evidence of bias on the part of the trial court. More than two years before David moved the judge to recuse, the judge openly notified the parties of his affiliation with the Catholic church as well as his prior affiliation with the Oldham County Board of Education. He further informed the parties all of his children had attended public schools and he believed they had received excellent educations. The trial court’s conduct throughout the pendency

of the matter below did not demonstrate bias toward either party or favoritism of any particular religious view, nor does the record reveal any impediment to the trial court's fairness and impartiality. David received a fair hearing by a fair and impartial judge.

EXPERT TESTIMONY

David next contends the trial court erred in rejecting Dr. Buckner's expert testimony which it found to be biased. He contends that since Dr. Buckner was the sole expert to testify, the trial court was bound to give credence to and accept his testimony. David contends the sole reason the trial court disregarded Dr. Buckner's testimony was because of his own personal religious views, and thus the trial court abused its discretion in so doing. We again disagree.

It is well-settled in this Commonwealth that the "trier of fact has the right to believe the evidence presented by one litigant in preference to another. The trier of fact may believe any witness in whole or in part." *Id.* at 29-30 (quoting *Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996) (internal citations omitted)). Thus, as there was no jury impaneled, the trial court alone was vested with the discretion to determine the credibility of the witnesses and to adjudicate the matter.

We know of no precedent requiring the trier of fact to blindly accept an expert's testimony simply because of his status as such and refuse to announce such a rule today. David's argument to the contrary is unsupported by legal principles, but rests merely upon conjecture and speculation. The trial court did

not abuse its discretion in weighing all of the testimony presented when conducting its analysis.

EDUCATIONAL DECISION-MAKING

David's final allegation of error is that the trial court improperly granted Susan sole custody for the limited purpose of making educational decisions for their child. He argues this decision was merely a creative way for the trial court to impose its biased opinion on this matter without overtly doing so as the trial court was well aware Susan would insist upon the child continuing in the parochial school system. He contends the trial court's decision amounts to a violation of his rights under Section 5 of the Kentucky Constitution. We disagree.

When joint custodians cannot agree upon a major issue affecting a child, the trial court must convene a hearing and decide the matter for them in accordance with the child's best interests. *Burchell v. Burchell*, 684 S.W.2d 296, 300 (Ky. 1984). Further,

[o]nce the parties have abdicated their role as custodians to the trial court, its decision is binding on the parties until it is shown that the decision is detrimental to the child physically or emotionally, or is no longer in his best interest.

Id. The trial court appropriately followed that mandate in the case *sub judice*. As David correctly contends, the trial court could not compel him to send his child to a school to which he was conscientiously opposed without running afoul of the Kentucky Constitution. However, as noted by the trial court, it would also be improper to prohibit Susan from sending the child to the parochial school of her

choice. Thus, the court correctly believed it was required to make the decision in such a way as not to violate either party's constitutional rights.

As the issue presented in this matter appears to be one of first impression in this Commonwealth, we look to our sister jurisdictions for guidance in making our decision. Other states have consistently held trial courts have the inherent ability to "break the tie" when joint custodians cannot agree on how to educate their minor children, and we agree. *See Morgan v. Morgan*, 964 So.2d 24 (Ala. Civ. App. 2007) (courts may not compel any particular form of education, but may decide which parent's plan is in child's best interest); *Seyler v. Seyler*, 201 S.W.3d 57 (Mo. Ct. App. 2006) (test for determining when court should order private or parochial schooling for child over wishes of one parent is when schooling will meet the child's particular educational needs); *Donna G. R. v. James B. R.*, 877 So.2d 1164 (La. Ct. App. 2004) (affirming judgment of trial court ordering children to enroll in public school over custodial parent's wishes because attending public school was in children's best interest); *Buysse v. Buysse*, 42 Pa. D. & C. 4th 415 (Pa. Com. Pl. 1999), *aff'd*, 797 A.2d 1020 (Pa. Super. Ct. 2002) (affirming trial court's judgment ordering child to attend particular school in settling a dispute between married parents); *Sotnick v. Sotnick*, 650 So.2d 157 (Fla. Dist. Ct. App. 1995) (affirming selection of school by trial court to resolve impasse between divorced parents with joint custody); and *Anderson v. Anderson*, 56 S.W.3d 5, 8 (Tenn. Ct. App. 1999) (when parents have joint custody, it is appropriate for trial court to intercede and "break the tie" if parents cannot agree

on child's education). Even in those cases in which the dispute was, as here, based on religious grounds, our sister jurisdictions have allowed trial courts the ability to mandate a child's educational future without violating the constitutional doctrine of separation of church and state. *See Marriage of Debenham*, 896 P.2d 1098 (Kan. App. 2d 1995) (stability and best interests of child must prevail over religious or educational preferences). Although none of the cited cases is on all fours with the matter presented herein, their logic is sound and their holdings are instructive. The best interests of the child must prevail.

It is well-settled in the Commonwealth that if a motion to modify a custody decree is brought within two years of its entry, a party must allege and prove the child's physical, mental, moral or emotional health is presently in danger or that the child has been placed with a *de facto* custodian. KRS 403.340(2). David contends this statutory provision mandates reversal of the trial court's decision as neither of the two factors were alleged or proven. However, he has failed to note that after the passage of two years from the entry of a final decree, the standard reverts to an inquiry into whether a change in circumstances has occurred such that a modification of custody is in the best interests of the child. KRS 403.340(3). Thus, we hold the trial court properly considered the best interests of the child as the controlling standard in making its decision.

The trial court did not make its decision based upon religion or the lack thereof and did not allow itself to be drawn into a "Holy War." As was proper to do, the trial court heard all of the evidence, assessed the weight and credibility

of the witnesses' testimony, and made its decision. We are unable to conclude based upon the record before us that the trial court's decision was colored by his personal religious views. Charney, Johnson and Susan all recommended the child be sent to the parochial school and expressed their reasons for that opinion. It was uncontroverted that the child wished to attend St. X and continue on the educational path he had been on since attaining school age. Dr. Buckner and David each recommended sending the child to any school other than one with religious ties and also included their reasons therefor. It was thus incumbent upon the trial court to "break the tie" and resolve this dispute based upon its perception and weighing of the conflicting evidence.

A trial court's determination of factual disputes will not be disturbed on appeal unless it is clearly erroneous, meaning it is unsupported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). Regardless of the weight of the evidence, the presence of conflicting evidence, or the fact that a reviewing court might have reached a contrary conclusion, we are required to give due regard to the opportunity of the trial court to judge the credibility of witnesses. CR⁵ 52.01. Based upon a careful review of the record we conclude the trial court's decision was supported by substantial evidence and its determination of which evidence was most credible was not clearly erroneous.

However, we must inquire as to whether the trial court acted properly in modifying its previous custody determination when it granted Susan sole

⁵ Kentucky Rules of Civil Procedure.

custody for the singular issue of making educational decisions while maintaining joint custody for all other purposes. We hold that it did. David's contention that such a "hybrid" arrangement is foreign in this jurisdiction and finds no support in the law is incorrect. "Joint custody" is not defined in our statutes, but is generally defined by the parties' agreement or in the trial court's decree. Just as joint custody does not require equal time sharing, it also does not require equal decision-making authority, *Fenwick v. Fenwick*, 114 S.W.3d 767, 776 (Ky. 2003), as modified (overruled on other grounds by *Frances v. Frances*, 266 S.W.3d 754 (Ky. 2008) and *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008), as modified), and although such equality may be preferred, decision-making may be "reposed solely in one parent after dissolution." *Burchell, supra*, 684 S.W.2d at 299.

Contrary to David's contention, it is not unusual for a court to grant authority for particular decisions solely to one party. Although this discretion is typically found in trial court determinations of where a child will reside, the power is not so limited by statute or caselaw. In *Squires v. Squires*, 854 S.W.2d 765, 769 (Ky. 1993) (citing *Chalupa v. Chalupa*, 830 S.W.2d 391 (Ky. 1992)), the Supreme Court of Kentucky declared that even when awarding joint custody, trial courts had the ability to determine a child's residence and to "make such other orders as are necessary to effectuate joint custody." In *Shraberg v. Shraberg*, 939 S.W.2d 330, 331 (Ky. 1997), our Supreme Court noted with approval that although the parties had previously agreed for the wife to have sole custody, the trial court granted joint custody but reserved decision-making in the wife as though she was the sole

custodian. Finally, in *Fenwick, supra*, 114 S.W. 3d at 778, note 30, the Supreme Court “recognize[d] that the trial court may designate one parent the sole right to make certain major decisions while granting both parties equal rights and responsibilities for other major decisions[,]” just as the parties may do themselves by agreement. Thus, in light of these precedents, we reject David’s argument. We find no error in the trial court’s grant of sole custody to Susan for the limited purpose of making educational decisions.

Finally, we note that this matter presents a very unique and compelling factual background. As such, we feel it necessary to limit our holdings today to this particular fact pattern. Because each custody dispute is in its own way different, determinations such as those set forth herein must continue to be made on a case-by-case basis.

For the foregoing reasons, and having found no error in the proceedings, the judgment of the Oldham Circuit Court is affirmed.

ALL CONCUR.

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