

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002761-MR

RICHARD J. MIDDLETON

APPELLANT

v. APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE JERRY WINCHESTER, JUDGE
ACTION NO. 94-CI-00655

VICKY MULLINS MIDDLETON

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: BUCKINGHAM, HUDDLESTON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from orders denying appellant's post-decree motions for modification of custody, for permission to take the minor child out of private school, and for recusal. Appellant argues that he was denied procedural due process when the court did not conduct an evidentiary hearing on his motions and when the court denied his motion for recusal. Upon reviewing appellant's arguments in light of the record herein and the applicable law, we adjudge that the first argument was not properly preserved for review. The remaining argument

regarding the motion to recuse is without merit. Thus, we affirm.

Appellant, Richard Middleton, and appellee, Vicky Mullins Middleton, were divorced by a decree of dissolution entered on November 20, 1996. The decree granted joint custody of the parties' minor child, Meghan, born February 21, 1993, with Vicky being designated as the primary residential custodian and Richard being granted visitation. The decree also provided that Vicky shall not enroll the child in any public daycare without first consulting Richard.

On June 29, 1998, Richard made a motion to modify custody so as to award him primary residential custody. Subsequently, Richard also moved to have the child taken out of a private school in which she had been enrolled in the fall of 1998. Vicky enrolled Meghan in Oak Grove Elementary School against the wishes of Richard who wanted the child to go to Corbin Elementary School. Both of these motions and numerous other motions of the parties were set for hearing by the court on October 16, 1998. On that date, a hearing was held on the motions, but it was not a formal hearing in which evidence was put on by the parties. Rather, counsel for both parties argued their positions before the court, and that apparently was the basis for the court's rulings thereon. On October 26, 1998, the court entered its order denying appellant's motions for modification of custody and to withdraw the child from Oak Grove Elementary School. The court did, however, grant appellant's motion to be put on the sign-out sheet at the school. Thereafter, appellant made a motion for the trial judge to recuse

himself from the case on grounds of bias. This motion was denied on January 12, 1999. From the orders of October 26, 1998 and January 12, 1999, appellant now appeals.

Appellant first argues that he was denied his procedural due process rights when the court failed to conduct a full evidentiary hearing on his motions. In reviewing the record of the hearing of October 16, 1998, we do not see that appellant ever asked for a full evidentiary hearing or sought to introduce evidence at the hearing. Nor did appellant express any dissatisfaction with the hearing. In fact, when asked by the court what relief appellant sought, appellant's counsel responded only that her client wanted to be put on the school's sign-out sheet for the child, which the court ordered. Further, during the discussion regarding the enrollment of the child in Oak Grove Elementary School, when the court asked appellant's counsel what was wrong with the school, counsel responded, "Well there isn't anything really. . . ." Appellant's counsel goes on to say, "Well, we don't want her removed from Oak Grove Elementary because it would be highly disruptive to her. She is a little five and a half year old girl. We want Mr. Middleton on the sign-out sheet." There was also no mention by either party of the custody issue at the hearing.

Where the trial court has not been given an opportunity to pass upon appellant's contentions of error, there could be no appellate review of the alleged errors. Kaplon v. Chase, Ky. App., 690 S.W.2d 761 (1985); Payne Hall, Ky., 423 S.W.2d 530 (1968). In the instant case, appellant did not raise the issue

of the adequacy of the hearing until January 4, 1999 during the hearing on the recusal motion. In our view, the issue was not properly preserved. Thus, it is precluded from our review.

Appellant next argues that the court denied his due process rights to an impartial decision maker when it denied his motion to recuse. KRS 26A.015(2)(a) and SCR 4.300, Canon 3C(1) require a judge to recuse himself if he has personal bias or prejudice concerning a party. The burden of proof is on the individual alleging such bias or prejudice. Commonwealth v. Carter, Ky., 701 S.W.2d 409 (1985). A motion to recuse must have been made before the appearance at a hearing on the merits of the action unless based on facts discovered after the issue has been decided. Mills v. Mills, Ky., 429 S.W.2d 852 (1968). In reviewing the record, we see no indication that the trial judge was biased against appellant. The appellant's recusal motion, which was made after the October 26, 1998 order denying his motions, alleged only that the trial judge summarily ruled against him. The fact that a judge ruled against the party seeking recusal is not sufficient evidence of bias. Id. It is also worth noting that appellant previously sought the recusal of two domestic relations commissioners on the case. In our view, the motion to recuse was properly denied.

For the reasons stated above, the orders of the Whitley Circuit Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Barbara Elliott Yeager
Barbourville, Kentucky

BRIEF FOR APPELLEE:

Jane R. Butcher
Williamsburg, Kentucky

