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Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001639-ME
AND
NO. 2005-CA-001914-ME
AND
NO. 2005-CA-002308-ME

JONI BRENDA MAHAN — APPELLANT

v.

APPEAL FROM FAYETTE FAMILY COURT
HONORABLE JO ANN WISE, JUDGE
ACTION NO. 92-CI-02223

GEORGE BARTON MAHAN — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER, JUDGE; BUCKINGHAM AND EMBERTON, SENIOR JUDGES.[1]

EMBERTON, SENIOR JUDGE: These consolidated appeals stem from orders of the Fayette Family Court which changed the primary residential custodian of the parties' sixteen-year old son Mattison, from appellant Joni Mahan to his father, appellee Bart Mahan. The order further held Joni Mahan in contempt for

[1] Senior Judges David C. Buckingham and Thomas D. Emberton sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

failure to comply with orders to return Mattison from her home in Florida to the custody of his father in Kentucky, and denied Joni Mahan's motions for an emergency custody change and for recusal of the family court judge presiding over the case. We affirm the decision of the trial judge in each appeal.

Incorporated into the decree dissolving the marriage was a settlement agreement awarding the parties joint custody, with Joni being designated primary residential custodian of their two children Meredith and Mattison, aged 17 and 16 respectively at the time of the filing of Bart's motion for change of custody. A lengthy hearing on that motion focused primarily upon the children's poor academic performance, as well as Meredith's living arrangements following Joni's move to Florida in May 2005. Bart testified at the August 3, 2005, hearing that he had become aware that although Mattison had been enrolled in Eastern High School, St. Xavier High School and Jefferson County "e-school" over the past two years, he had not earned any high school credits. With regard to Meredith, Bart was concerned about an apparent lack of supervision for Meredith who was residing with the family of one of her friends to complete her junior year of high school after Joni's move to Florida. He stated that there had been a significant drop in Meredith's grades and that he questioned the advisability of

Joni's plans to allow Meredith to remain in Louisville with this family during her senior year.

Joni countered the testimony about Mattison's lack of academic achievement by outlining the problems encountered in efforts to stabilize his blood sugar levels after he was diagnosed with juvenile onset diabetes in 2002 and how those problems interfered with his ability to attend school regularly. She also stated that she had enrolled Mattison in a Florida school as a sophomore for the next school year. Regarding Meredith, Joni disputed the allegation that Meredith's living arrangements evidenced a lack of supervision, stating that she had previously been a good student and that both children were good, well-mannered individuals. Joni testified that Bart had a volatile temper and had been verbally abusive to her during their marriage, emphasizing that both children were afraid of, and intimidated by, their father. The trial judge also heard testimony from Joni's sister who lives in Florida about her family's ability to help Joni with Mattison's illness and conducted an in camera interview in which each child testified as to their wishes and feelings toward their parents.

At the conclusion of the hearing, the trial judge concluded that while Bart had failed to satisfy his burden with respect to Meredith, there was evidence sufficient to warrant a change in the primary residential custodian for Mattison and

ordered an immediate transfer to his father. The trial court formalized its decision by entry of a final and appealable order on August 8, 2005. Joni filed a notice of appeal from the order concerning Mattison on August 9, 2005.

Joni also sought emergency and intermediate relief from this Court, which was denied by orders entered on August 11, 2005, and September 14, 2005. In the meantime, on August 23, 2005, Mattison left his father's house in a new BMW automobile and drove, with only a learner's permit, to his mother's house in Florida. On August 24, 2005, the trial court granted Bart's emergency motion for immediate entitlement, ordering Joni to return Mattison to his father's custody on or before Friday morning, August 26. At a hearing conducted on that day, the trial judge was informed that Joni had not delivered Mattison to his father as directed by the order of August 24. Joni did not attend the hearing but was represented by counsel who argued that Joni had nothing to do with Mattison's running away from his father's home; that she was doing everything she could to induce Mattison to return to Kentucky, but he refused to comply; that Mattison was in psychological distress and needed mental health intervention in Florida; and that Mattison was threatening to run away and secrete himself if forced to return to his father's custody. The trial judge then gave Joni until the following Monday

morning to return Mattison to his father or face a finding of contempt. Another hearing was scheduled for Monday, August 29. The trial judge emphasized that if Mattison was in need of emergency hospitalization to address his psychological situation, it would be taken care of upon his return to Kentucky.

At the hearing conducted on Monday, August 29, the trial judge was informed that Mattison had not been returned to his father's custody. Although Joni's counsel argued at the hearing that the orders entered on August 24 and 26, 2005, were procedurally defective and thus unenforceable for lack of reasonable notice, they stated Joni was nevertheless attempting to comply with those orders. The trial judge disagreed and stated on the record her conclusion that Joni should be held in contempt for failure to comply with the court's orders. She also authorized Bart to travel to Florida to effect Mattison's return to his custody, imposing monetary sanctions by requiring Joni to pay Bart's legal and other expenses incurred in regaining custody of Mattison. These ruling were formalized in a written order entered September 13, 2005. In that same written order, Joni's motion to alter, amend or vacate the order changing the primary residential custodian was denied. The orders of August 24, 26, and September 13, 2005, form the basis of Joni's second appeal.

When Bart arrived at Joni's home on September 14 with the assistance of a Lee County Florida deputy sheriff, Joni refused to relinquish possession of Mattison because Bart had not obtained a Florida court order. After Bart subsequently obtained an order from a Florida court, a Florida sheriff advised Joni that she would be arrested if she failed to comply with the Florida order and she ultimately delivered Mattison to the Juvenile Assessment Center on Friday, September 16. Mattison was then released to his father later that day and remains in his father's custody.

On October 5, 2005, Joni filed another emergency motion seeking custody of Mattison alleging that his present environment "seriously endangered his physical, mental, moral and emotional health," supported by several affidavits including her own, that of her sister and of Dr. Rhonda Mancini, a psychologist who had been seeing Mattison. Dr. Mancini stated in her affidavit that Mattison was exhibiting multiple symptoms consistent with depression and anxiety, and she expressed concern that his behavior might escalate to the point that Mattison may become dangerous to himself or others. The motion also sought recusal of the trial judge, appointment of a guardian ad litem and a psychological evaluation for Mattison. The trial judge entered an order denying the motions for immediate physical custody, for appointment of a guardian ad

litem and for recusal. Although the order denied the motion for a psychological evaluation, it directed Bart to provide "appropriate and necessary psychological and medical treatment for Mattison." These orders form the basis for the third appeal.

Citing Fenwick v. Fenwick,[2] Joni first argues that the trial judge erred in holding a hearing on Bart's motion for a change in the primary residential custodian because his objection to her relocation was not timely. We disagree. It is clear from a review of the pleadings and argument at the hearings that Bart's intent in seeking a change in the primary residential custodian stemmed from his discovery of Meredith's living arrangements after Joni relocated to Florida and the fact that the educational advancement of both children, but of Mattison in particular, was in considerable jeopardy. Because we are convinced that Joni's relocation to Florida was but an incidental factor in the children's present circumstances, we conclude that the trial judge did not err in conducting a hearing as Bart's motion did not implicate the factors at work in Fenwick.

Joni next argues that because there was no evidence to satisfy the requirements of KRS 403.340(3), the trial judge erred in concluding that it was in Mattison's best interest to

[2] 114 S.W.3d 767 (Ky. 2003).

change the primary residential custodian to his father. Again, we disagree. The trial judge recited on the record at the conclusion of the hearing the KRS 403.340 factors that she concluded necessitated a change in the primary residential custodian:

> I do believe that his mother has blatantly failed as a parent to see to it that he [Mattison] attended school and completed the last two years of school. As a matter of fact, I don't know what went on in the past level of involvement and why that was but it doesn't bode well—even if I take Ms. Mahan's position that she was primary caretaker and [Bart] didn't visit very much. We've got a 16 year old child that is just now at a level of starting high school That is absolutely scary to me and there are a lot of children that deal with disabilities, whether it be diabetes or anything else, and clearly his mother has not been able as a parent to adapt, develop skills, educate herself, educate him to do the very basic in one of our most important parental functions, which is to get our children to school and see to it that they attend school regularly.
>
> I think that if [Mattison] were to continue to live with his mother, there would be a serious endangerment that he may not ever finish high school. . . . . With regard to the harm factor, by change of environment outweighed by its advantages, I think that his dad has the structure necessary to see to it, the drive and time to see to it, that [Mattison] gets to school and finishes high school. I think that [Mattison] has got a significant relationship with his dad. He just knows what his dad is going to say. He doesn't want to hear it—-which is go to school, get on track. I don't think these children have had much discipline, ever.

Contrary to Joni's assertion, there is really no dispute in the evidence that Mattison completed even one high school credit over the past two school years. Thus, her argument with respect to the introduction of Mattison's school records is unpersuasive. We are absolutely convinced that, on the basis of the testimony adduced from Joni, Bart and Mattison, the trial judge correctly found a crisis in the educational prospects for the child unless drastic measures were taken. The trial judge was not unmindful of the difficulties posed by Mattison's diabetes. Not only did she hear significant evidence of the testing and blood sugar levels to be achieved before Mattison could attend school, but the trial judge also had before her evidence that his diabetes had not inhibited him from excelling in golf and doing the things necessary to accomplish that goal. Diabetes notwithstanding, Joni offered no real explanation for Mattison's failure to make even minimal progress in high school. On the basis of the evidence in the record, we find ample support for the trial judge's conclusion that Mattison's best interests were served by changing the primary residential custodian to his father. In light of our discussion on this issue, it is apparent that Joni was not entitled to a directed verdict on Bart's motion.

Joni also challenges the entry of the August 24 ex parte order of entitlement by which Bart sought to enforce the order changing primary residential custodian. Although Joni strenuously argues lack of notice, her counsel was present at the hearing conducted on August 26 during which the trial judge gave Joni additional time to comply with the August 8 and August 24 orders. A second hearing was conducted on August 29, at which Joni was again given every opportunity to present her side of the matter. The bottom line is, regardless of the timing of faxes and the lack of telephonic communication between attorneys, Joni was afforded a full and fair opportunity to comply with the court's orders whereby she could avoid contempt and fully present her positions to the trial judge. The trial judge was faced with the actions of a 16 year-old child who had fled the custody of his father, driving to Florida with just a learner's permit, and the refusal of his mother to cooperate in effectuating his return, despite having been given every opportunity to do so. On these facts, we perceive no procedural error sufficient to require setting aside of the trial judge's thoughtful and well-reasoned orders.

Nor do we perceive any error in the trial judge's refusal to recuse. In support of her claim of error, Joni cites the fact that one of her witnesses was a former client of the trial judge who bankrupted a substantial amount of her

attorney's fees and the fact that the trial judge's sheriff overheard and reported to the judge a communication between Joni and her counsel. We find no error on either count.

In Stopher v. Commonwealth,[3] the Supreme Court of Kentucky reiterated the burden placed upon a party seeking disqualification of a judge:

> KRS 26A.015(2) requires recusal when a judge has "personal bias or prejudice concerning a party ··· [,]" or "has knowledge of any other circumstances in which his impartiality might reasonably be questioned." KRS 26A.015(2)(a) and (e); *see* 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,* Ky., 348 S.W.2d 759, 760 (1961), *cert. denied,* 368 U.S. 993, 82 S.Ct. 613, 7 L.Ed.2d 530 (1962); *see also Johnson v. Ducobu,* Ky., 258 S.W.2d 509 (1953). The mere belief that the judge will not afford a fair and impartial trial is not sufficient grounds for recusal. *795 *Webb v. Commonwealth,* Ky., 904 S.W.2d 226 (1995).

As was the case in Stopher, we are convinced Joni has failed to satisfy her burden of demonstrating facts which call into question the judge's ability to be impartial.

Concerning the witness, the trial judge stated on the record that she was not even aware that she had been a former client until that fact was called to her attention. In any

[3] 57 S.W.3d 787, 794-5 (Ky. 2001).

event, there is no basis upon which we might reasonably conclude that the trial judge would allow that previous relationship to "sway her judgment" in ruling upon a matter as serious as a custody change.[4]

With regard to the sheriff, it appears that immediately after the trial judge stated on the record her reasons for changing custodians, he overheard Joni say to her counsel in the presence of Mattison that the trial judge's ruling would cause him to run away, a matter the trial judge specifically cautioned the parties not to discuss in Mattison's presence. The sheriff then reported Joni's statement to the trial judge. Again, Joni fails to demonstrate that this knowledge on the part of the trial judge gave rise to actual bias. In fact, the record reveals that quite the contrary was true. At the hearings on Bart's immediate entitlement motions, the trial judge repeatedly stated that she was not making any assumptions that Joni was culpable in Mattison's decision to flee to Florida and that all Joni had to do to avoid a finding of contempt was to assist Bart and the court by cooperating in his return. It is abundantly clear to us that Joni's repeated refusal to comply with reasonable court orders resulted in her contempt citation, not any bias on the part of the trial judge.

Finally, Joni predicates error on the denial of her

[4] See Mills v. Commonwealth, 170 S.W.3d 310 (Ky. 2005).

motions for immediate custody, for appointment of a guardian ad litem and for a psychological evaluation. A review of the record clearly attests to the fact that the matters addressed in these motions had been argued and re-argued in the course of the previous hearings. The trial judge was well-aware of the concerns about Mattison's physical and mental health and made appropriate provisions for them in her orders. In our opinion, these motions were in reality yet another attempt to circumvent the order changing primary residential custodian, an order we concluded to be entirely proper at the outset of this opinion. Although we understand Joni's concern for what she believes to be the well-being of her son, we are convinced that the orders of the Fayette Family Court are far more likely to serve his best interests and should be upheld.

Accordingly, the judgment of the Fayette Family Court in each of these appeals is hereby affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Elizabeth Dodd Lococo Louisville, Kentucky	Elizabeth S. Hughes Lexington, Kentucky