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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-001789-ME

MELISSA JANSSEN

APPELLANT

v. APPEAL FROM HARDIN FAMILY COURT
HONORABLE MATTHEW B. HALL, JUDGE
ACTION NO. 03-CI-00690

CHARLES EDENS

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KRAMER, CHIEF JUDGE; DIXON AND TAYLOR, JUDGES.

KRAMER, CHIEF JUDGE: Melissa Janssen appeals the Hardin Family Court's order suspending her parenting time. After a careful review of the record, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 2003, the Hardin Family Court entered a divorce decree, which ended the marriage between Janssen and Charles Edens. At the time of the divorce decree, Janssen and Edens had two minor children together: a four-year-old daughter and a two-year-old son. Following the entry of the decree, Edens moved to modify custody of the parties' children. The court ordered that Edens should be the primary residential custodian, but that the parties should share joint custody of the children. Janssen was permitted to exercise parenting time pursuant to the local family court rules.

Edens subsequently moved the court to terminate the eight one-week periods of visitation throughout the year. The family court suspended the eight one-week periods of visitation.

Months later, Edens moved to terminate Janssen's visitation on the basis that when his daughter was visiting Janssen, Janssen's stepson "became physical and violent with her [by] kicking, hitting and knocking her into a wall and injur[ing] her hand." Edens claimed that in support of his motion, he had "a note from the doctor requesting that the child not be around the individual who fractured her hand for a period of four to six months so that her hand c[ould] have adequate time to heal."¹ The family court ordered that Janssen's visitation be terminated pending further orders of the court. It appears that Janssen's visitation

¹ A copy of that note was not included in the record before us on appeal.

was orally reinstated during a subsequent hearing, but there does not appear to be a written order reinstating her visitation.

Approximately eight months later, Edens moved to suspend all of Janssen's visitations except for the every-other-weekend visitation and the holiday visitations that last two days or less. Edens contended that the last time he had left the children with Janssen, he had given her specific instructions so that she could get the children's prescriptions refilled, and he had also given her a schedule of the children's activities for the week, which included a Girl Scout meeting, two softball practices and a basketball game. Edens alleged that Janssen failed to refill an allergy prescription;² failed to refill the son's Adderall prescription, so he was without that medication for two days; and failed to take the children to their activities. The court granted the motion. Janssen moved to set aside the order suspending visitation, but the family court denied her motion.

Approximately ten months later, Janssen moved to reinstate her parenting time per the local rules of the court. The court denied her motion.

One year later, Edens moved to terminate all of Janssen's visitation/parenting time due to problems at Janssen's home with having a functioning septic system. The family court entered an order remanding Edens's motion to terminate visitation/parenting time because Janssen had resolved the issues prior to the hearing.

² Janssen claims that she instead only purchased two pills for \$1.00 each from the pharmacy.

Janssen then moved the court to modify custody and give her the sole care and control of the children, while giving Edens supervised visitation. In support of her motion, Janssen filed an affidavit, making allegations, *inter alia*, that Edens had neglected and abused the children. The court denied the motion.

Subsequently, Edens moved to terminate Janssen's parenting time with the children. In support thereof, he filed an affidavit alleging as follows:

Affiant states that his son is on ADHD medication and another medication to help him sleep at night. He has to take this medication daily. This Affiant sent the medication with his son on the weekend of July 26th and on the weekend of August 9th. Both times the medication was not returned to this Affiant. This Affiant does not take the medication out of containers to send just the exact amount over with the child but simply sends the medicine bottle with pills in it.

[Janssen] stated that she spilled the pills but there is absolutely no reason why she could not keep up with this medication. As a result of her actions my son had to go without medication until we were able to get it refilled. On at least one occasion when [Janssen] sent back medication for my son she tried to replace all of the pills that we sent over with Zyrtec pills. I am assuming that she was hoping that we would not notice. The medications are controlled substances which are subject to abuse by adults and I am concerned that she is doing something with this medication other than giving it to our son.

That [Janssen] is married to Stacy Janssen and we have had a previous order whereby she is not to leave the children [with] Mr. Janssen. On August 23rd, she left both children under his care while she went to work.

That on or about the weekend of August 22nd, my son had a band event at 1:00 p.m. at the Grayson County High School. [Janssen] was working that day and instead of

calling me and making some arrangements for the care of our son she simply dropped him off at the high school at 9:00 a.m. with no money and a bologna sandwich. Practice was not scheduled to start until 1:00 p.m. I do not think it is appropriate for my 13[-]year[-]old son to be unsupervised for that length of time and I certainly do not think it is appropriate for him to be dropped off somewhere with no money and no cell[ular tele]phone. Eventually the Band Director showed up and paid for my son's lunch.

The court held a hearing on the motion, during which Edens's wife, Denisa Edens, testified that when the children were returned on July 26th, the son (who, based upon his date of birth as stated in the divorce decree, would have been fourteen years old by this time) did not have his Adderall with him. Janssen offered to return to her house and get it, but Denisa told her she had just had it refilled, so they did not need it at that time. Regarding August 9th, Denisa testified that she had sent some Clonidine with the son to Janssen's house. Denisa attested that the Clonidine is a sleeping medication. When the son returned back to Edens's house, he did not have the Clonidine with him, and Denisa explained to Janssen that she had sent all of the Clonidine they had with him to Janssen's house. Janssen told Denisa that she did not have it. Denisa attested that she found five pills from an older bottle to give to the son, and she had to wait five days to get the prescription refilled. The next weekend, Janssen asked Denisa how many pills had been sent, and Denisa told her and asked why. Janssen told her that another young boy who was at the house had come into contact with the pill bottle and spilled the pills from it, but she had the empty pill bottle. That Sunday, when the children

were being returned, Janssen told Denisa that she had found all of the pills. However, when Denisa returned home, she looked at the pills, and they were Zyrtec instead of Clonidine. When Denisa asked about the Clonidine, Janssen told her that she (*i.e.*, Denisa) must have switched the pills when Janssen returned the pills to Edens's home. The missing Clonidine pills were never returned.

Denisa also testified that there was a court order stating that the children should not be left alone with Janssen's current husband. However, on August 23rd, when the children returned to the Edens home, they said that they had been left alone with Janssen's husband. Denisa attested that when she asked Janssen about it, Janssen responded that she had not left them with him for a long time. Janssen had apparently left them with her husband while she went to work. Denisa also testified that there was a time when the son was supposed to be at school at a particular time on a Saturday for marching band, and Janssen dropped him off at school three and a half hours early.

Janssen testified that she did not recall the incident of the missing Adderall, but that if there had been Adderall missing, she would have offered to return home to get the pills and bring them back to the Edens home. However, she did remember the incident with the missing Clonidine, and she attested that she did offer to return to her mother's house (her mother had been watching the children) to try and find it, but that Denisa told her not to worry about it because she had extra Clonidine at the house. The next time she was going to work and she took her young children to her mother's, she inquired about the missing Clonidine.

Janssen attested that her mother told her that she had put the Clonidine inside a locked case inside a locked cabinet because there were small children around, and Janssen's three-year-old son kept trying to get into the pill bottle. Janssen's mother told her she had set the empty Clonidine bottle on the banister as a reminder for Janssen to take the pills with her, but Janssen saw the empty pill bottle and assumed that meant that there were no more pills. Janssen testified that her mother then took the empty pill bottle, refilled it with the pills, and gave it to Janssen, who then took it to Denisa.

Janssen also attested that she did not leave the children alone with her husband. She stated that she did not work on August 23rd, and that they went to church that day.

The family court opined orally during the hearing that it did not believe Janssen, and it believed that Janssen was leaving the children with her husband. It noted that Janssen's husband had been under intense scrutiny by the court for years (although it did not explain why he had been under scrutiny). The court also stated that it believed Janssen was either using the pills herself or selling them. The family court noted that this was not the first time this year that it had heard a case where pills had been removed from a pill bottle and switched with something else. The court stated that Adderall is a controlled substance and that both Adderall and Clonidine are subject to abuse, and they are also very valuable on the open market. The court opined that it did not care if a child the son's age

was “hanging out at school for four hours,” but that it did care if Janssen could not keep up with his medicines.

In its written order, the court found as follows:

It is the opinion of this Court that [Janssen] is not responsible with the child’s medication, it is not convinced the child is receiving his medication while in her care, and not sure that other people are not using the medication in the home and not sure that the medication is not being sold. Additionally, there was inconsistent testimony as to what happened to the medication, the medication containers and this Court believes that [Janssen] lied under oath here today which is why she was warned about her right[s] as this Court believes that she violated [a] Court Order in allowing Mr. Janssen to supervise the children when no one else was around, which is subject to contempt. Furthermore, this is not the first, second or third time there have been issues with custody, visitation and doing things the way the court has ordered before and this Court is afraid that [Janssen] is on the same slippery slope once again.

The Court does not trust [Janssen] with the child’s medication for reasons stated above and the child needs this medication on a daily basis. Therefore, [Janssen’s] parenting time is hereby suspended, pending further Orders of this Court.

Janssen now appeals, contending that the family court’s order should be reversed because: (a) Charles Edens’s affidavit and testimony were inadmissible; (b) the family court judge relied on his own extrajudicial knowledge; and (c) the family court judge should have recused himself for partiality.

II. ANALYSIS

A. CHARLES EDENS’S AFFIDAVIT AND TESTIMONY

Janssen first alleges that the family court's order should be reversed because Charles Edens's affidavit and testimony were inadmissible. She asserts that Edens's affidavit was inadmissible because it was not based on personal knowledge. In turn, she contends that because the affidavit was inadmissible, his motion to terminate Janssen's parenting time did not satisfy the requirements of CR³ 7.02, and it should not have been considered by the family court. Janssen also contends that Edens testified during the hearing in this matter that the statements set forth in his affidavit were not based upon his personal knowledge. However, Janssen failed to object concerning Edens's affidavit or testimony before the trial court.⁴ Hence, this issue is not properly before this Court. *See, e.g., Tamme v. Commonwealth*, 973 S.W.2d 13, 33 (Ky. 1998).

Regardless, we note that Denisa testified concerning the events upon which the motion was based, and it was evident from her testimony that she was testifying from first-hand knowledge of the events. Therefore, testimonial evidence was produced at the hearing to support Edens's motion and to support the family court's order terminating Janssen's parenting time.

B. EXTRAJUDICIAL KNOWLEDGE

Janssen next contends that the family court judge improperly relied on his own extrajudicial knowledge. Specifically, Janssen alleges that the judge incorrectly found that Clonidine is a controlled substance, and that it is subject to

³ Kentucky Rules of Civil Procedure.

⁴ We note, nonetheless, that CR 7.02(1) merely requires the motion to "state with particularity the grounds therefor;" it does not require the filing of an affidavit.

abuse and it is valuable on the open market. Thus, Janssen argues that the question should have been subject to proof and that evidence should have been required.

Edens contends that those findings of the family court were dicta, and that the real issues before the court were “whether [Janssen] was mishandling the medications, [whether she had] violat[ed] a prior court order by leaving the children with [her husband], and [whether] she left their son at school for [four] hours.”

As previously noted, the court did state during the hearing that Adderall is a controlled substance and that both Adderall and Clonidine are subject to abuse, and they are very valuable on the open market. Thus, Janssen incorrectly alleges that the court stated that Clonidine is a controlled substance, but Janssen correctly asserts that the court stated in the hearing that Clonidine is subject to abuse and valuable on the open market.

Regardless, we must agree with Edens here. The point from the trial court is that it clearly believed, based on the testimony, that prescription medication was not properly being handled by Janssen and that the son was not getting his daily medication while in the care of Janssen. Moreover, this Court has said frequently that the court speaks only through its written record. *Holland v. Holland*, 290 S.W.3d 671, 675 (Ky. App. 2009). The written order of the trial court is based upon its credibility findings and is supported by the testimony in the record, which it reasonably believed. The court also stated that it was suspending Janssen’s parenting time because it believed she had violated a court order by leaving the children in the care of her husband when nobody else was there.

Therefore, the court's decision to suspend parenting time was based upon the evidence presented during the hearing, not from the judge's extrajudicial knowledge. Consequently, this claim lacks merit.

C. RECUSAL

Finally, Janssen contends that the family court judge should have recused himself for partiality. We note that in the years since 2008, when the family court judge herein began presiding over this case, Janssen has never filed a motion to recuse. Accordingly, we will loosely construe her argument to mean that the family court judge should have recused himself *sua sponte*.

The Kentucky Supreme Court has held that:

a judge shall disqualify in a judicial proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer[] or personal knowledge of disputed evidentiary facts concerning the proceeding.

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.

Alred v. Commonwealth, Judicial Conduct Commission, 395 S.W.3d 417, 429 (Ky. 2012) (internal quotation marks and footnotes omitted). Additionally, KRS⁵ 26A.015(2)(a) provides: "Any justice or judge of the Court of Justice or master commissioner shall disqualify himself in any proceeding: Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed

⁵ Kentucky Revised Statutes.

evidentiary facts concerning the proceedings, or has expressed an opinion concerning the merits of the proceeding.”

Many of the allegations Janssen launches against the family court judge reference credibility findings made against her. If judges could routinely be disqualified for making credibility determinations, all trial court judges would have to recuse. Credibility findings are the very essence of a trial court judge’s role, particularly in family court. *See, e.g., B.C. v. B.T.*, 182 S.W.3d 213, 219 (Ky. App. 2005):

Since the family court is in the best position to evaluate the testimony and to weigh the evidence, an appellate court should not substitute its own opinion for that of the family court. If the findings of fact are supported by substantial evidence and if the correct law is applied, a family court’s ultimate decision regarding [visitation] will not be disturbed, absent an abuse of discretion. Abuse of discretion implies that the family court’s decision is unreasonable or unfair. Thus, in reviewing the decision of the family court, the test is not whether the appellate court would have decided it differently, but whether the findings of the family court are clearly erroneous, whether it applied the correct law, or whether it abused its discretion.

(Internal footnote and citations omitted). This Court has reviewed the entirety of the hearing herein, and we conclude that each of the written credibility findings and/or oral statements made by the trial court judge had a sound basis and that the trial court judge was in the best position to make these determinations, particularly being very familiar with this family over the past eight years. Accordingly, each of Janssen’s claims regarding the credibility issues lack all merit.

Janssen's allegation that the judge should have recused himself because he stated during the hearing that Clonidine is subject to abuse and it is valuable on the open market also lacks merit.⁶ Janssen argues that this demonstrated the judge's partiality because his opinion was based upon an extrajudicial source. Any statements made by the trial judge herein regarding Clonidine were *dicta*, and the disputed evidentiary facts in this case concerning Clonidine did not involve whether Clonidine was subject to abuse or valuable on the open market. Instead, the judge suspended Janssen's parenting time due to Janssen's lack of responsibility in giving the child his Clonidine on a daily basis and her failure to keep track of the medication to ensure the remainder of the prescription was returned with the child to Edens's home. This is not a basis for recusal.

Janssen next asserts that the family court judge stated: "I'm not sure other people are not using the medications in the home." However, this was merely a reasonable concern expressed by the judge based upon the testimony provided by Denisa that multiple pills from one child's Clonidine prescription went missing when the child was in Janssen's care, and when Janssen attempted to return the Clonidine pill bottle to Edens's home, the Clonidine pills that had been inside the bottle had been mysteriously replaced with Zyrtec. Based upon Denisa's testimony, this was a reasonable concern for the court to have.

⁶ Janssen also asserts that the judge found that Clonidine is a controlled substance. However, this is an erroneous statement as the written order does not include this finding.

Janssen further alleges that the judge stated: “I’m not sure the medications are not being sold.” Again, because there was testimony presented that the one child’s Clonidine pills went missing and Janssen returned the Clonidine prescription bottle with Zyrtec pills inside the bottle rather than Clonidine, this was a reasonable concern for the court to express. Consequently, there was no need for the judge to recuse himself based upon this concern.

Janssen also contends that in a prior hearing in this case which occurred more than two years earlier than the hearing at issue, the judge stated the following to Janssen:

Ms. Janssen, there will come a time, if you keep living this way, that I will suspend your time with the kids. I am not . . . I have not forgot the child covered in mud. I have not forgot the time I first met you in this hearing room. We had a hearing where there were all sorts of problems, not just with the baby, but with the older kids, too. I have not forgotten much about . . . uh . . . about these hearings; and your standards for living . . . uh . . . do not meet mine. And that is a dangerous thing for you, because my minimum standards may be less than most; but yours are less than mine.

Thus, Janssen argues that this shows the judge was biased against her. However, Edens notes that this particular judge “has been presiding over [the case] since approximately 2008 and has become familiar with the background and family. One of the rationales of family court is to have one judge familiar with the family’s case and situation to be able to make fair and equitable decisions.” We agree with Edens – the judge’s statement merely showed that he was familiar with the

family's background, and the statement also served as a warning to Janssen of things she needed to do to continue spending time with her children (specifically, to improve her standards of living). This is a proper function and purpose of family court. Consequently, there was no need for the judge to recuse.

Accordingly, the order of the Hardin Family Court is affirmed.

ALL CONCUR.

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