

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-000711-MR

MARK A. BOLTON

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT  
HONORABLE STEVEN R. JAEGER, JUDGE  
ACTION NO. 94-CI-00139

AMY ELIZABETH BOLTON

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM EMBERTON AND TACKETT, JUDGES.

BUCKINGHAM, JUDGE. Mark A. Bolton appeals from an order of the Kenton Circuit Court denying his motion for an order requiring the parties' two children to attend a public school and denying his motion to reconsider the court's prior order granting his former wife, Amy Elizabeth Bolton, a judgment for \$5,500.00 for one-half of the children's tuition at a private Catholic school. Finding no error, we affirm.

The parties were married in 1987 and separated in 1994. During the marriage, the couple had two sons, Nicholas, who was born in December 1989, and Benjamin, who was born in December

1991. Mark filed for divorce in February 1994 and requested joint custody of the children. In November 1994, the parties entered into a Settlement Agreement that called for joint custody of the children with Amy having primary physical possession of the children subject to visitation by Mark. It also stated that the parties anticipated the children would receive private schooling, that they would discuss the economic feasibility of continued private education annually, and that each party would pay one-half of any private school tuition. On November 15, 1994, the circuit court entered a decree of dissolution that approved and incorporated by reference the parties' Settlement Agreement.

As each child reached the proper age, Amy enrolled them in a Catholic private school. In November 1995, Amy filed a motion seeking a contempt order for Mark's failure to pay his share of the children's school tuition. In February 1996, an Agreed Order was entered that acknowledged Mark owed \$255.00 for unreimbursed school tuition and required him to pay the arrearage.

In November 1999, Amy filed a motion to compel Mark to abide by the terms of the Settlement Agreement with reference to the school tuition provision. In an accompanying affidavit, Amy alleged Mark had failed to make any tuition payments and was in excess of \$11,000.00 in arrears. In November 1999, Mark filed a motion to modify custody seeking to be designated the primary residential custodian of the children during the school year with Amy having physical possession of the children during the summer.

He stated in an affidavit that he had purchased a new residence under the belief that Amy had agreed to allow the children to attend a public school.

On November 22, 1999, the circuit court conducted a hearing on the motions. Mark challenged Amy's request for school tuition reimbursement stating he had never agreed to send the children to a private school. Amy denied having agreed to send the children to public school or to a modification of custody. The court held that Mark was obligated to pay for part of the private school tuition under the Settlement Agreement. It orally awarded Amy a judgment for \$5,500.00 plus interest representing one-half of the children's past private school tuition.<sup>1</sup> The court reserved the issue of modification of child custody for further proceedings.

On January 21, 2000, Mark filed a motion requesting, inter alia, reconsideration of the November 1999 judgment awarding Amy one-half of the children's private school tuition and seeking an order requiring the children to attend a particular public school starting in August 2000. On February 21, 2000, the trial court conducted a hearing on the motion. Mark testified that in conversations with Amy after the divorce, he repeatedly objected to sending the children to a private school because he could not afford the additional costs. He

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<sup>1</sup> The certified record on appeal does not contain a written order or judgment reflecting the trial court's oral rulings. However, Amy has included a court calendar reflecting the rulings that has a circuit clerk stamp indicating it was entered on November 23, 1999. It is unclear why the certified record has this omission.

stated that he believed any decision on schooling would be a joint decision but that Amy enrolled the children in a private school over his objection. He admitted that the private school the children had been attending was satisfactory, but he objected to the added expense. Amy testified that the children had been attending the same private school for several years and that they told her they did not want to transfer to a public school. She stated that the parties had agreed to raise the children in the Catholic faith and that she preferred to have them attend a Catholic school. She admitted not having asked Mark to help pay the school tuition for several years.

On February 22, 2000, the circuit court entered an order denying Mark's motion to reconsider the \$5,500.00 judgment for Amy for prior school tuition reimbursement and denying his request for an order requiring the child be sent to a public school. The court stated that the Settlement Agreement indicated the parties anticipated the children would attend private schooling and it was in the best interest of the children for them to continue in the school they were attending at least until the completion of their elementary school education. This appeal followed.<sup>2</sup>

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<sup>2</sup> Amy argues the appeal should be dismissed because the notice of appeal was filed outside the 30-day time period. She contends Mark's January 21, 2000, motion to reconsider was untimely because it was filed more than 10 days after the court's November 1999 order. See CR 59.05. She states the appeal concerns the court's November 23, 1999, order. However, CR 59.05 states a motion to alter or amend a judgment "shall be served not later than 10 days after entry of the final judgment." CR 73.02(1)(a) states that a notice of appeal "shall be filed within 30 days after the date of notation of service of the judgment . . . (continued...)"

Mark contends that the circuit court misinterpreted the Settlement Agreement and erred in determining continued attendance at their current private school was in the children's best interest. He argues that under the terms of the Settlement Agreement, the decision on private schooling was subject to the financial abilities of and joint agreement by the parties. Mark points to Amy's failure to seek reimbursement for the tuition for several years as evidence that the parties' intent under the Agreement was to discuss the issue of private schooling and make a joint decision based on the economic conditions. He also notes his repeated objections to private schooling.

We begin with the general principle that the trial court has broad discretion in determining the best interest of children in child custody situations. See generally, Squires v. Squires, Ky., 854 S.W.2d 765 (1993); Krug v. Krug, Ky., 854 S.W.2d 765 (1993). A trial court has the authority to make all orders "as are necessary to properly effectuate joint custody." Squires, 854 S.W.2d at 769. When considering disputes between the parents on issues concerning the children such as their education, a trial court has discretion to resolve the dispute within a joint custody situation based on the best interests of the children. See, e.g., Burchell v. Burchell, Ky. App., 684

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<sup>2</sup>(...continued)  
..” In this case, the November 23, 1999, order was never entered into the record and correspondingly there was no notation of service of the judgment on the docket sheet. As a result, the November 23, 1999, order was not a final judgment triggering the time limitations of CR 59.05 or CR 73.02(1)(a), and the appeal was timely filed following the February 22, 2000, order and judgment.

S.W.2d 296 (1984); Jacobs v. Edelstein, Ky. App., 959 S.W.2d 781, 784 (1998) (noting now discarded Mennemeyer procedural requirement did not restrict trial court's authority to resolve disputes over children's education and religious upbringing).

With reference to the Settlement Agreement, amicable agreements between divorcing couples are generally encouraged. See KRS 403.180. If a trial court does not find a separation agreement unconscionable, it is binding on the court except for matters concerning custody, support, or child visitation. KRS 403.180(2). The terms of an agreement incorporated in a divorce decree are enforceable as a judgment and as a contract. KRS 403.180(5).

Mark's first issue concerns the judgment for reimbursement of past school tuition, which depends on an interpretation of the Settlement Agreement. Generally, unless there is evidence that public school is inadequate or the special needs of the children render public school inadequate, a parent is not obligated to pay for attendance at a private school. See, e.g., Miller v. Miller, Ky., 459 S.W.2d 81, 83-84 (1970). However, a parent may be required to pay for private school education under an agreement between the parents. Cf. Stevens v. Stevens, Ky., 798 S.W.2d 136 (1990) (holding father contractually agreed to pay for child's college education).

In the current case, the trial court referred to the Settlement Agreement, which provides in relevant part as follows:

It is anticipated that the children will receive private schooling. Currently, the minor child, Nicholas, is enrolled in Latonia Baptist Kindergarten. The parties shall

discuss the economic feasibility of continuing to enroll the children in private schooling no later than July 1<sup>st</sup> of each year. In the event that the children attend private schooling, the Husband shall pay one-half of the tuition for each child. The wife shall pay the remaining one-half of the tuition.

This provision does not attempt to authorize either parent as the primary decision-maker on the children's schooling, and as asserted by Mark, a joint custody arrangement involves joint decision-making on major issues affecting the children such as education.<sup>3</sup> See Burchell, *supra*; Aton v. Aton, Ky. App., 911 S.W.2d 612 (1995). Although the Settlement Agreement suggests that economic conditions would be a factor in the schooling decision, Mark misconstrues the court's decision as ratifying a unilateral decision by Amy without regard to the financial conditions of the parties.

As the court noted, the Settlement Agreement set forth an expectation or preference for private schooling, subject to re-evaluation facilitated by consultation between the parties concerning the economic feasibility of continued private schooling. While Mark proclaimed an inability to financially afford the costs of private schooling, he provided little or no evidence to support his position. The children had been attending the same private school for several years before Mark raised this issue in court. Mark does not dispute that the Settlement Agreement explicitly requires him to pay one-half of the tuition if the children attend private school. Given the

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<sup>3</sup>But see KRS 403.330.

preference in the Agreement, Mark bore the obligation to seek a change in the status quo if he disagreed with the children's schooling. Amy's failure to seek immediate compensation or reimbursement for the tuition costs did not release him from the terms of the Agreement. Mark has not shown that Amy's inaction led him to believe he was not responsible for a portion of the tuition as evidenced by the fact that he continued to object to the private schooling for financial reasons in discussions with her. Therefore, the court properly held that Mark was responsible for one-half of the tuition costs and that Amy did not violate the terms of the Settlement Agreement.

Mark's second issue involves a claim that the trial court's order denying his request that the children be required to attend public school violated his right to free exercise of religion under the First Amendment of the U.S. Constitution and Section 5 of the Kentucky Constitution. The trial court's action was based on its decision that continued private school education at the school the children were attending was in their best interests.

First, we note that Amy testified Mark agreed to have the children raised in the Catholic faith. Both children had attended the same Catholic school from the beginning of their first year of elementary education. At the time of the hearing, the older child had been at the school for approximately five years. As indicated earlier, the Settlement Agreement created an expectation that the children would attend a private, presumably faith-based, school. Amy also testified that the children

expressed a desire to remain at the school. Mark testified that the school the children were attending was a quality school and they were happy there. In order for them to attend the public school suggested by Mark, his physical possession of the children would have had to be increased substantially. As Amy argued, such a change would have dramatically altered the children's lives. Mark did not present sufficient evidence to require such an action. We find no abuse of discretion in the trial court's decision.

As for Mark's constitutional argument, he has not cited to the record where this argument was preserved and we have been unable to find where he raised this issue before the trial court; therefore, it was waived and not properly preserved for review. See, e.g., Regional Jail Authority v. Tackett, Ky., 770 S.W.2d 225, 228 (1989); Forrester v. Forrester, Ky. App., 979 S.W.2d 928, 931 (1998); Elwell v. Stone, Ky. App., 799 S.W.2d 46, 47 (1990); Hibbitts v. Cumberland Valley Nat'l Bank; Ky. App., 977 S.W.2d 252, 253 (1998); CR 76.12(4)(c)(iv).

Nevertheless, this argument is without merit. Mark's objection to the children's attendance at a private school was based on financial grounds, not any deep religious concern. The Settlement Agreement states the parties "anticipated" the children would attend a private school. As the court noted in Hoefers v. Jones, 288 N.J. Super. 590, 672 A.2d 1299 (1994), the court's authority to act in the best interest of the child under its duty as *parens patriae* can sometimes prevail over a parent's constitutional rights.

Religious and moral training have been considered an important, positive growth experience in advancing a child's best interests and general welfare by our courts; but how practiced, how implemented, our courts have held, are best left to the appropriate parent or parents, in this case, the plaintiff, mother. The children's attendance at King's Christian School in no way interferes with the defendant's right to believe, to practice a religion or not. In reality, what defendant seeks, by withholding financial support, is the right to superimpose, to force his values on his former wife and children. This he should not be permitted to do.

Id. at 609-10, 672 A.2d at 1309-10 (citations omitted).

It is clear that the trial court considered the parties' Settlement Agreement, past practice, and the overriding concern for the children's best interest. Allowing the children to continue attendance at a private school or making him pay a portion of the private school tuition does not constitute an establishment of religion or unduly interfere with Mark's practice of religion in violation of the constitution.

For the foregoing reasons, we affirm the order of the Kenton Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

H. Henry Kramer  
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BRIEF FOR APPELLEE:

Dean A. Pisacano  
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