

RENDERED: OCTOBER 10, 2008; 2:00 P.M.  
 NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2007-CA-001985-ME

CRAIG HOFFMAN

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT  
v. HONORABLE PATRICIA WALKER FITZGERALD, JUDGE  
ACTION NO. 05-CI-503735

SARAH ELIZABETH GEORGE

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; KELLER, JUDGE; HENRY, SENIOR JUDGE.<sup>1</sup>

HENRY, SENIOR JUDGE: Craig Hoffman appeals from orders of the Jefferson Circuit Court which directed that his daughter, Lily,<sup>2</sup> would attend kindergarten at

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<sup>1</sup> Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

<sup>2</sup> The child's name is spelled "Lily" in the appellate briefs and "Lilly" in the trial court's orders; we have employed the spelling used by the parties.

a parochial school preferred by her mother, Sarah Elizabeth George. Hoffman argues that the decision violates his constitutional rights. We affirm.

Craig Hoffman and Sarah Elizabeth George are the parents of Elizabeth Paige “Lily” Hoffman, who was born on September 4, 2002. Hoffman and George dated for several years before Lily’s birth, but they never married nor did they ever live together. They arrived at a joint custody arrangement whereby Lily resides for equal amounts of time with each parent.<sup>3</sup> Lily attended Plainview preschool with both parents’ approval until she approached kindergarten age in 2006. At that point, Hoffman and George could not agree on an elementary school for Lily. Hoffman, who was raised as an Anglican and has attended a Lutheran church for over fifteen years, preferred St. Matthew’s Elementary, a public school. George, who is a lifelong Roman Catholic, favored Holy Spirit Parish School, a Roman Catholic parochial school.

A trial on this matter was held before the family court on June 1, 2007. The trial court heard testimony from the parents and also from Hoffman’s expert witness, Debbie Montgomery. Montgomery, who has served as a special education teacher, a high school counselor and a court liaison with the Jefferson County Public School system, testified as to the excellence of the academic programs at St. Matthew’s Elementary, its welcoming atmosphere and its diverse student population. Father Frederick W. Klotter, the pastor of St. Martin of Tours

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<sup>3</sup> Lily resides with Hoffman on Mondays and Tuesdays, with George on Wednesdays and Thursdays, and alternates between parents on Fridays and weekends.

Catholic Church in Louisville, and an expert in canon law, testified on George's behalf as to the merits of a parochial education.

Following the trial, the family court issued an order containing extensive findings of fact. We set forth the passages which are particularly pertinent to this appeal:

Mr. Hoffman has conducted an extensive effort to locate a school which he believes will provide the best education for his daughter. During his search he investigated both public and parochial schools. He did not express any religious or philosophical opposition to a parochial school, but wants the best fit for his daughter. He has selected St. Matthews Elementary School, where he thinks Lily would receive an excellent education. St. Matthews Elementary School is a public school which has received acclaim for its programs, parent involvement, and student achievement. It offers a wide variety of educational, sports, and community programs. In addition to the structure of the program, Mr. Hoffman feels that St. Matthews offers an excitement and enthusiasm that he has not seen at other schools.

Ms. George also considered several different schools and looked at both public and parochial schools. Ms. George desires for Lily to attend Holy Spirit Parish School. Ms. George has selected this school on the basis of two criteria which are important to her: academic excellence and religion.

Holy Spirit is smaller than St. Matthews Elementary. While St. Matthews has 550 students in grades kindergarten-fifth, with four kindergarten classes, Holy Spirit has 409 students in grades kindergarten-eighth and has two kindergarten classes. Ms. George finds the size and atmosphere at Holy Spirit to be warmer and more nurturing and believes that this environment would better suit Lily, who [sic] she described as shy. Holy Spirit also has received national acclaim for its programs and standardized tests show that its students

excel academically. Holy Spirit also has demonstrated strong parent involvement and community programs. Finally, it is extremely important to Ms. George that her daughter be raised in a Catholic school. She considers her Catholic faith to be an essential element of her being and wants her daughter to attend parochial school as did she and other members of her family.

The trial court noted that both schools are convenient to the parents' homes and that George had agreed to assume the cost of the parochial education. In conclusion, it stated that

Mr. Hoffman's attorney has argued that this case is not about religion, it is about education, and he is correct. However, the Court has been presented with two highly appropriate schools for this child where neither is identifiably superior to the other. The only other factor that has been presented to the court is Ms. George's strong desire to have her child attend a parochial school, an option that does not appear in and of itself to be objectionable to Mr. Hoffman. As there is no other factor which directs the Court in its selection of schools, given Ms. George's very strong preference and family tradition of attending Catholic schools, the Court will direct that Lily be enrolled in Holy Spirit Parish School[.]

Hoffman filed a motion to alter, amend or vacate the judgment or for a new trial, arguing that the court's decision violated his constitutional rights. The trial court denied the motion, noting that while

Mr. Hoffman now says that he has a strong objection to having his daughter attend a Catholic school, Mr. Hoffman did not make such an objection known to the Court at the time of trial and in fact the unrefuted testimony was that Mr. Hoffman had seriously considered another Catholic school for the child, to the point that he had the child tested for purposes of determining eligibility for enrollment.

This appeal followed.

In making a significant decision regarding a child's upbringing, such as determining where it will attend school, the trial court is directed to consider the best interests of the child:

If . . . the parties to a joint custody agreement are unable to agree on a major issue concerning their child's upbringing, the trial court, with its continuing jurisdiction over custody matters, must conduct a hearing to evaluate the circumstances and resolve the issue according to the child's best interest. Once the parents 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.

*Burchell v. Burchell*, 684 S.W.2d 296, 300 (Ky. App. 1984).

The appellate standard of review of such a decision includes a determination of whether the factual findings of the family court are clearly erroneous. A finding of fact is clearly erroneous if it is not supported by substantial evidence, which is evidence sufficient to induce conviction in the mind of a reasonable person. Since the family court is in the best position to evaluate the testimony and to weight 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 custody will not be disturbed, absent an abuse of discretion. Abuse of discretion implies that the family court's decision is unreasonable or unfair.

*B.C. v. B.T.*, 182 S.W.3d 213, 219 (Ky. App. 2005) (citations omitted).

Hoffman argues that the trial court's ruling favors a religious institution, namely Holy Spirit Parish School, and thereby violates his rights under

the First Amendment of the United States Constitution and Article Five of the Kentucky Constitution, which provides in part that “No preference shall ever be given by law to any religious sect, society or denomination . . . nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed[.]”

However, as the trial court noted in its order denying Hoffman’s motion to alter, amend or vacate the judgment, Hoffman never raised these constitutional objections at the trial. This is confirmed by our review of the trial record, wherein Hoffman’s own testimony refutes his contentions on appeal. The appellant “will not be permitted to feed one can of worms to the trial judge and another to the appellate court.” *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976). For example, when describing his search for an appropriate school for his daughter, Hoffman openly testified that he looked at ten schools, “parochial, private and public.” Furthermore, he never disputed George’s testimony that he had seriously considered St. Albert the Great, a parochial school located near his home, as a potential school for Lily, and that he had gone as far as having Lily tested for admission. Evidence was also presented that Lily had been baptized as a Roman Catholic and that Hoffman had attended the baptismal ceremony, at which he had agreed that the child would be raised in that religion. Although Hoffman testified that he felt the baptism was a generic “Christian” ceremony and that he had never agreed to raise Lily as a Roman Catholic, he never expressed a conscientious objection to such an upbringing. Similarly, when Hoffman testified

that Lily attends the Lutheran church with him on alternate Sundays and that she is familiar with prayers and Bible stories, his stated goal was to show that Lily gets “enough religion at home” and was not in need of further religious education at school, not to argue that his constitutional rights would be infringed upon if she attended a Roman Catholic elementary school.

The trial court made extensive findings of fact, all of which are supported by substantial evidence. It did not abuse its discretion in deciding that Lily should attend Holy Spirit, because that decision is neither unreasonable nor unfair in light of the evidence presented at trial.

For the foregoing reasons, the orders of the Jefferson Circuit Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Harold L. Storment  
Louisville, Kentucky

BRIEF FOR APPELLEE:

B. Mark Mulloy  
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