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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000499-MR

LYNNETTE ADKINS WILSON
(F/K/A LYNNETTE ADKINS) APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE DOUGHLAS M. GEORGE, SPECIAL JUDGE
ACTION NO. 10-CI-001477

MICHAEL SCOTT ADKINS APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE, NICKELL, AND STUMBO, JUDGES.

NICKELL, JUDGE: Lynnette Adkins Wilson has appealed from the August 24, 2011, order of the Pulaski Circuit Court denying her motion to enroll her minor children in a parochial school and the February 7, 2012, order denying her motion to alter, amend or vacate the previous ruling. Following a careful review, we affirm.

Lynnette was married to Michael Scott Adkins in 1995. The union produced two sons. Difficulties arose in the relationship prompting entry of a divorce decree on December 15, 2003. Lynnette was granted sole custody of the minor children. She was ordered to enroll the children in Science Hill Elementary School, a public school, rather than in Saline Christian Academy. The children attended public school from January 2004 to 2010. On October 27, 2010, Lynnette moved the trial court for an order authorizing her to remove the children from Science Hill Elementary and enroll them in Saline Christian Academy. Following a hearing, the motion was denied on December 10, 2010. During the hearing the trial court noted Science Hill Elementary—the lone school in Science Hill Independent School District—was a kindergarten through eighth grade school, and stated its belief that, once both of the children matriculated from Science Hill, Lynnette would have authority to determine where they would attend school.

In August 2011 Lynnette enrolled the oldest child in Saline Christian Academy for his ninth grade year, based largely on the oral statements made by the trial court during the December 10, 2010, hearing. Almost immediately, Michael filed a motion seeking to restrain Lynnette from enrolling the child in the parochial school. Another hearing was conducted, following which the trial court entered an order on August 24, 2011, wherein it concluded the issue of where the children were to receive their education had been judicially determined on two prior occasions and believed it was bound by the principle of *res judicata* to rule consistently with the previous determinations. Alternatively, the trial court

determined the best interests of the children would be served by attending public schools. In support of its decision, the trial court specifically found:

> a. There are more opportunities in Kentucky's public school system;
>
> b. Students who attend public schools have access to Kentucky Educational Excellence Scholarships ("KEES"). Children at Saline Christian Academy do not;
>
> c. There are more sports related activities for children to take part in at public schools than at Saline Christian Academy;
>
> d. The public school system offers up to 15 hours of Advance Placement into college classes, Saline Christian Academy does not;
>
> e. Public schools have more teachers to teach Kentucky core content classes whereas Saline Christian Academy has two individuals to teach its students all the core contents classes and;
>
> f. Kentucky's public schools employ individuals licensed to teach and educate the children who attend public schools. The individuals teaching at Saline Christian Academy are not licensed teachers.

Based on its view of the evidence and the standard of law to be applied, it granted Michael's motion to prohibit Lynnette from enrolling the child in Saline Christian Academy. It ordered Lynnette to enroll the child in an appropriate school within the Pulaski County public school system and to ensure his continued and regular attendance in school.

Lynnette's subsequent motion to alter, amend or vacate the August 24, 2011, order, resulted in yet another hearing and entry of an order on February 7, 2012,

supplementing the trial court's previous findings. In the latest order, the trial court examined the provisions of KRS[1] 403.330(1) regarding a sole custodian's discretion to determine a child's educational needs, and determined that although Lynnette had been granted sole custody of the children, the trial court had initially made the determination regarding the children's educational well-being; it did not grant Lynnette the right to change that determination in her role as sole custodian; and it retained "authority over determining what is best for the child's educational needs." The court went on to state

> [t]he absence of the programs available at Saline Christian School and the factors the Court considered and enumerated in its findings would significantly impair the child's emotional development as he prepares to become a young adult. The child would not have the same opportunities available to him that most children his age would receive in preparing for college or the workforce.

This appeal followed.

Lynnette contends the various bases upon which the trial court made its decision were improper and contrary to the holding in *Kentucky State Bd. for Elementary and Secondary Ed. v. Rudasill*, 589 S.W.2d 877 (Ky. 1979). She further alleges the trial court's finding that the child's emotional development would be impaired by attending Saline Christian Academy is unsupported by substantial evidence. Lynnette also challenges the trial court's conclusion regarding the *res judicata* effect of prior rulings regarding her children's education.

[1] Kentucky Revised Statutes.

Finally, she argues the trial court failed to consider the constitutional protections to which she is entitled as a parent.

The trial court's decision to require the children to attend public schools was based on the language of KRS 403.330(1) which states as follows:

> Except as otherwise agreed by the parties in writing at the time of the custody decree, the custodian may determine the child's upbringing, including his education, health care, and religious training, unless the court after hearing, finds, upon motion by the noncustodial parent, that in the absence of a specific limitation of the custodian's authority, the child's physical health would be endangered or his emotional development significantly impaired.

In its August 24, 2011, order, the trial court based its decision solely on what it termed the "best interests" of the child. When presented with Lynnette's motion to alter, amend or vacate pointing out the use of this improper standard, the trial court scheduled another hearing, took additional testimony, and made additional findings in compliance with the statutory language quoted above. The trial court referenced its earlier factual findings as a basis for finding the child's emotional development would be impaired by attending Saline Christian Academy.

A trial court's determination of factual disputes will not be disturbed on appeal unless it is clearly erroneous, meaning it is unsupported by substantial evidence. *Moore v. Asente,* 110 S.W.3d 336, 354 (Ky. 2003). Regardless of the weight of the evidence, the presence of conflicting evidence, or the fact that we as a reviewing court might have reached a contrary conclusion, we must give due

regard to the opportunity of the trial court to judge the credibility of witnesses. CR[2] 52.01. Decisions regarding the educational and emotional development of children are inherently fact-specific and must therefore be made on a case-by-case basis, and for this reason, our Opinion should be read to apply only to the particular facts involved in this appeal. Based upon a careful review of the record we conclude the trial court's decision was supported by substantial evidence and its determination of which evidence was most credible was not clearly erroneous. Further, we are unconvinced by Lynnette's remaining arguments that the trial court utilized an incorrect legal standard or failed to apply recognized constitutional protections.

Lynnette's reliance on *Rudasill* is misplaced. In that case, the Supreme Court of Kentucky was tasked with "establish[ing] the perimeter within which the Commonwealth may regulate the curriculum and instruction in private and parochial schools." While the *Rudasill* Court determined the Commonwealth could not require parochial instructors to be certified teachers under KRS 161.030(2), and the trial court here noted in its findings of fact that the teachers at Saline Christian Academy were not certified teachers, we cannot say this single finding rendered the trial court's decision infirm. Had this been the sole finding upon which the trial court had relied, Lynnette's argument might be persuasive. However, the trial court enumerated several additional factors in support of its decision.

[2] Kentucky Rules of Civil Procedure.

While Lynnette contends the trial court's ruling was based upon improper criteria, apart from her citation to *Rudasill* and general statements of her beliefs regarding why children are sent to private schools, her argument is devoid of supportive authority. As was proper to do, the trial court heard all of the evidence, assessed the weight and credibility of the witnesses' testimony, and made its decision. We are unable to conclude based upon the record before us that the trial court's decision was in error or constituted an abuse of discretion.

Next, Lynnette challenges the trial court's determination regarding the *res judicata* effect of prior rulings regarding the children's education. Our review of the record indicates that even were we to determine the trial court's decision was improper, any error would be harmless at best. After opining that the issues Lynnette raised regarding the children's education were barred by the two previous rulings on the matter, the trial court proceeded to address the merits of the issue noting it was doing so in the event it was incorrect on the *res judicata* issue. In its February 7, 2012, order, the trial court made no mention of *res judicata* but instead made additional findings. Although the trial court's initial judgment may have been predicated on an incorrect legal standard, its ultimate conclusion was correct and we, as an appellate court, may affirm a final ruling for any reason supported by the record. *Kentucky Farm Bureau Mut. Ins. Co. v. Gray*, 814 S.W.2d 928, 930 (Ky. App. 1991) (citing *Richmond v. Louisville & Jefferson County MSD*, 572 S.W.2d 601 (Ky. App. 1978)).

Finally, Lynnette contends the trial court gave no consideration to the constitutional protections she enjoys as a parent. In support of her allegation, Lynnette appears to argue KRS 403.330(1) and the Due Process Clause contained in the Fourteenth Amendment to the United States Constitution bestow an unfettered right upon her as the custodial parent to make all decisions concerning the care, custody and control of the minor child without interference from the judicial system. Although we agree with the general premise that parents have a fundamental right to make decisions concerning their children, under the facts and circumstances presented, Lynnette's argument must fail. The trial court explicitly determined the child's emotional development would be significantly impaired by attending Saline Christian Academy—a specific exception to a custodial parent's authority contained in KRS 403.330(1). The trial court further found it had specifically limited Lynnette's rights to make educational decisions in the initial decree and maintained such limitations throughout the litigation. The trial court's ruling was in compliance with constitutional and statutory guidance and will not be disturbed on appeal.

For the foregoing reasons, the judgment of the Pulaski Circuit Court is affirmed.

STUMBO, JUDGE, CONCURS.

MOORE, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

MOORE, JUDGE, DISSENTING: Respectfully, I dissent from the majority opinion for several reasons. I pause to note that as an associate judge on this panel,

I initially did not have the record to review. Consequently, I requested it from the writing judge's chambers, and it was promptly sent: two large boxes going back in time since 2001, filled with seemingly endless motions and allegations lobbed like missiles by the parties against each other. To put the parties' discord in context by way of example, the circuit court had to enter an order regarding parental visitation with the older boy when he was hospitalized for surgery on a brain tumor. No doubt regarding this, each of these parents likely points the finger of blame to the other for this situation. The Court has noted this in a previous opinion, wherein the Court stated that "each [party] has contributed to the conflicts between them. Unfortunately, both parents have used the children in their ongoing battles with each other. We hope that the parties are able to set aside their animosity and work together for the benefit of the children." (*Adkins v. Adkins*, 2004-CA-000408-MR, Aug. 6, 2004) (note omitted). In the years after the Court made those statements, the parties have continued to bicker endlessly. It is the children who typically suffer in this powder keg of plays for power. Upon my review of this record, the blame lay at both parents' feet.

Next, I note that Michael has not filed a brief in this appeal. Pursuant to Kentucky Rule of Civil Procedure 76.12(8), we may accept Lynnette's statement of the facts and issues as correct, or treat the failure to file a brief as a confession of error. *See Hallis v. Hallis*, 328 S.W.3d 694 (Ky. App. 2010). Given the long and convoluted record in this case, my view is that we should employ our discretion and treat Lynnette's statement of facts and issues as correct. However, the

majority opinion, acting rightfully in its full discretion, has declined this option. *See Flag Drilling Co., Inc. v. Erco, Inc*. 156 S.W.3d 762 (Ky. App. 2005). Accordingly, I proceed with my dissent.

I begin with the fact that when these parties divorced, the circuit court granted *sole* custody to Lynnette. This decision was affirmed by this Court on August 6, 2004.[3] The reasoning for this decision was sound and can be found in the Morgan Circuit Court's[4] extensive findings of fact and conclusions of law, wherein the court concluded that:

> The Court concludes that the best interests of the children dictate that [Lynnette] … should be granted *sole* custody of the two minor children herein. The Court, in making this award, cannot overlook the overwhelming testimony presented by numerous witnesses, including the children who have been in the almost exclusive physical custody of their father, that [Michael] has repeatedly interfered with and sought to deny contact between [Lynnette] and her children.

(Trial Court Findings of Fact, Conclusions of Law and Order, entered Dec. 15, 2003) (emphasis added).

The trial court wisely construed that joint custody was not in the boys' best interest and in all likelihood joint custody would only have made life more difficult on them. Consequently, the court gave *sole* custody to Lynnette.

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[3] *Adkins v. Adkins*, 2004-CA-000408-MR, Aug. 6, 2004.

[4] This case originated in Morgan Circuit Court, where the decree of divorce and custody order were entered. It was later transferred to Pulaski Circuit Court.

The primary difference between joint custody and sole custody involves decision making. Pursuant to KRS 403.330(1), "Except as otherwise agreed by the parties in writing at the time of the custody decree, the custodian may determine the child's upbringing, including his education, health care, and religious training, unless the court after a hearing, finds, upon motion by the noncustodial parent, that in the absence of a specific limitation of the custodian's authority, the child's physical health would be endangered or his emotional development significantly impaired." Our courts have construed KRS 403.330(1) as according custodians the right to make the major decisions affecting the child's education and religious training. *See Wireman v. Perkins*, 229 S.W.3d 919, 922 (Ky. App. 2007); *Klopp v. Klopp*, 763 S.W.2d 663, 665 (Ky. App. 1989). The custodian's authority to determine the child's upbringing "may be limited only upon proof by the non-custodian that the custodian has endangered the child's physical health or threatened the child with significant emotional impairment." *Wireman*, 229 S.W.2d at 922.

Regarding the issue presently on appeal as to the children's education, the only mention of that by the Morgan Circuit Court in its 2003 order, which is the basis for this on-going dispute, is as follows:

> [][Michael] expressed the concern that if the children lived with their mother that she would enroll them in Saline Baptist School which is an unaccredited, small school. [Lynnette] acknowledged that this would be her choice but that if so directed she would enroll the children in Science Hill Elementary which is a highly regarded elementary school.

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> [Lynnette] is hereby ORDERED to enroll the children in Science Hill Elementary as opposed to sending them to Saline Baptist for their education.

We should not simply gloss over the fact that the court which made the custody decision in this case, granted Lynnette *sole* custody—a sound decision that remains today, even in light of Michael's motion to modify custody, which was denied on February 7, 2012.

In ordering Lynnette to place the children in "Science Hill Elementary as opposed to sending them to Saline Baptist for their education," however, the Morgan Circuit Court did not make a finding that "the child[ren]'s physical health would be endangered or [their] emotional development significantly impaired," as required by KRS 403.330(1). Consequently from its genesis, the foundation for not allowing Lynnette to send the children to Saline has been flawed. However, Lynnette did not appeal that order.

In reviewing the hearing held on August 9, 2011, regarding Michael's current counsel's statements about whether or not evidence was taken before the trial court made the initial decision in 2003 regarding Science Hill Elementary, this argument is of no real value. The Morgan Circuit Court, the finder of fact in dissolution and custody decisions, made no findings regarding any evidence as to the quality of Saline. The Morgan Circuit Court in the custody order directed Lynnette to place the children in Science Hill *Elementary* as opposed to Saline

Baptist School. The order is clear on its face that it only related to the children's *elementary* school years. It does not address the children's high school education, and the question begs itself: how could the court in 2003, when the children were ages five and six, have known where they should go to high school? Clearly, it could not. Rather, Lynnette was given *sole* custody, and accordingly, this decision should have been hers short of the court's making a finding in accordance with KRS 403.330(1) that the "child's physical health would be endangered or his emotional development significantly impaired." In my view, no court to date has made either of these findings, nor is there evidence supporting either finding in the record.

As to the circuit court's rationale for its decision on the issue presently on appeal, it initially stated that this issue had been decided two times by previous courts. For the sake of clarity, I point out the circuit court's reference must necessarily relate to the original decision, discussed *supra*, and to a decision made after a December 10, 2010 hearing before Special Judge Bowling, upon motion by Lynnette to move the children into Saline Baptist School in January of 2011, while they were still in elementary school. Judge Bowling interviewed the children in chambers, without either parent or their counsel present. After meeting with the boys, the court stated on the record that:

> I have to treat that Order [the initial custody order] the same as if it were my Order, that I'm the judge that entered it, even though I am not. While that Order does have a little wiggle room in it, I think we're not quite there yet, but the way I'm going to interpret that Order is

> that they were ordered to go to the Science Hill Elementary School, which goes though, what, the eighth grade. **So it kind of leaves an open area for after they're both out of the eighth grade, then it's not clear where they go after that**. But for now, I'm going to deny the Motion that they be placed in the Saline Christian Academy. You know, frankly, just my own point of view is – well, I guess that comes with a prejudice, and I told the boys, I said, I'm a product of public schools from start to finish, you know, that's where I found my learning. And frankly, I think that's where you get your best education in the public school system, or at least your most well-rounded. . . . But for now, they're going to remain in the Science Hill, until the youngest one is out of the elementary school. I think once that happens, you know, we can talk about it then.

(Emphasis added).

Regardless of the oral statements of the court, a court only speaks through its written orders. *Kindred Nursing Centers Limited Partnership v. Sloan*, 329 S.W.3d 347, 349 (Ky. App. 2010). The order entered after the hearing was a handwritten entry on the docket sheet stating "respondent's motion to allow children to attend Saline Christian Academy is overruled." Thus, the oral statements regarding what the court believed was to transpire upon the children's exiting elementary school was not included in the order. Nonetheless, on its face, this order does not satisfy KRS 403.330(1) because it does not explain how the boys' physical health would be endangered or their emotional development significantly impaired if they attended Saline.

Thereafter, Michael filed a motion to prohibit Lynnette from placing the older boy in Saline after he finished his elementary school education. In my view,

Lynnette had the full authority to do so without leave of court as the sole custodial parent upon the child's finishing school at the elementary level—the term for the original order from Morgan Circuit Court (flawed or not) having been fulfilled. Nevertheless, the court held a hearing on Michael's motion. As earlier noted, counsel for Michael made much about evidence being taken in the Morgan Circuit Court divorce and custody case. Regardless of the evidence taken, the Morgan Circuit Court did not make findings regarding any evidence presented as to Saline, and again, it's my view that in absence of KRS 403.330(1) being fulfilled, the original order was in error. Nevertheless during the hearing on August 9, 2011, Saline was assaulted by Michael for not being accredited by the Kentucky Department of Education, for its size, for teachers not holding a teaching certificate, etc. In short because it was not a public school, Michael clearly viewed it as substandard regardless of the potential benefits his children may have received from attending there. The only evidence that was taken illustrated that Saline's students are accepted by major universities and that its students have access to 145 different events and/or activities available for its students. It was Michael's motion and the burden was on him to prove, with substantial evidence, how KRS 403.330(1) was met. In my view, he wholly failed in his burden of proving the "child's physical health would be endangered or his emotional development [would be] significantly impaired" by attending Saline. Moreover, there was no testimony or evidence at all regarding what was in the children's individual best interest. In sum, the two institutions were compared in a vacuum without any

evidence of what type of environment was in the best interests of the children.

Some children thrive in smaller environments; some do not. But, certainly there is no evidence in the record regarding which environment better suits these children. This by far is the most troubling part for me.

Based on generic findings of the differences between Saline and public schools, the circuit court held that "[i]t is in the best interest of the parties' minor children to be enrolled in, attend and graduate from Kentucky's public school system." As is evident from that order, there was nothing individualized about the evidence, findings or order that related to these individual children. And, in fact, although the record is full to overflowing, upon review I have not located any individualized findings regarding education relating to the specific best interests of the children involved in this case. That is clear error and certainly constitutes an abuse of discretion.

In my view, the requirements for the court to become involved with the decisions of where these children are to be educated have never been met. And, in the absence of KRS 403.330(1) having ever been fulfilled, I agree with Lynnette that her fundamental rights as a parent to raise and educate her children as she chooses, as a sole custodian, have been greatly impaired by the courts without any foundation whatsoever.

BRIEF FOR APPELLANT:

Vaughn Murphy
Frankfort, Kentucky

A.C. Donahue
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BRIEF FOR APPELLEE:

No brief filed.