

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001255-MR

CHARLES SHANNON JONES

APPELLANT

v.

APPEAL FROM ROWAN CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 03-CI-00294

JULIE JONES

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT, MOORE, AND NICKELL, JUDGES.

LAMBERT, JUDGE: In this post-dissolution action, Charles Shannon Jones (Shannon) has appealed from the June 19, 2013, order of the Rowan Circuit Court requiring him to pay to his former wife, Julie Jones,¹ his portion of the orthodontic expenses for their minor children as well as the circuit judge's failure to recuse.

¹ The record reflects that the appellee's first name is Julia, not Julie as listed in the original petition and the notice of appeal. However, we shall refer to her as Julie because that is how she refers to herself in her appellate brief.

We have carefully considered the record and the parties' arguments, and finding no error or abuse of discretion, we affirm.

Shannon and Julie were married on August 17, 1990, and they separated in July 2003. Two children were born of the marriage: Caleb, born February 28, 1998; and Jenna, born December 27, 1999. Shannon filed a petition in the Rowan Circuit Court to dissolve their marriage in August 2003. The court entered a decree of dissolution on March 18, 2004, in which the court also awarded the parties joint custody of the minor children with Shannon to receive visitation, and ordered Shannon to pay Julie \$734.34 per month in temporary child support. By separate order entered March 25, 2004, the court set forth that Julie would be the primary residential parent and that Shannon was to pay her \$169.46 per week in temporary child support. Regarding the children's expenses, the court set forth the parties' agreement as follows:

3. The children are currently covered by health and dental insurance through the Wife's employer, and they shall continue to for so long as such insurance is available at a reasonable cost. The parties agree that they shall split all medical, surgical, dental, orthodontal, optometric, nursing and hospital services, professional counseling or psychiatric therapy for diagnosed medical disorders, drugs and medical supplies, appliances, laboratory, diagnostic and therapeutic services, prescription and optical expenses, including any co-payments or deductibles which are not covered by insurance per the statutes, namely KRS 403.211(8) which splits the cost of this extraordinary medical expenses in proportion to the combined monthly adjusted parental gross incomes, currently figured at 56% Husband and 44% Wife, after the first \$100.00 per child per calendar year is paid by the Wife. The parties agree to present

each other with a copy of the bills incurred while the children are in their care, for reimbursement within a reasonable time of the date that same are incurred.

On June 12, 2012, Julie filed a motion requesting the court to hold Shannon in contempt for failing to reimburse her for the children's medical expenses in the amount of \$3,339.51. She attached an affidavit stating that in 2011, she had paid \$6,163.41 out-of-pocket for medical, dental, and optical expenses. Based upon their agreement, Shannon owed her the sum of \$3,339.51. She had e-mailed him the bills and contacted him about payment, but Shannon refused to pay. However, he offered to pay her \$10.00 per month for these expenses, which she did not believe was fair because he was financially capable of making these payments. Julie also requested that Shannon be ordered to pay her attorney fees for bringing the motion.

Shannon objected to Julie's motion, stating that when they discussed the matter, he told Julie that he was not in a financial position to contribute one-half of the costs of the braces for the two children. Shannon also stated his belief that the braces were not medically necessary. In addition, Shannon requested that his attorney fees be paid. By separate filing, Shannon moved to change the visitation exchange point.

The circuit court held a hearing on July 31, 2012, on Julie's motion for contempt on the repayment of the medical expenses and on Shannon's visitation motion. Shannon argued that the orthodontic treatment was not medically necessary, while Julie stated that she had been to three orthodontists and they all

agreed that the children needed braces and implants to correct their dental problems, including missing teeth lateral to their front teeth. The court then stated, “What happens when you don’t get those [eye teeth] is your mouth collapses and you ultimately end up with TMJ. Am I wrong?” Julie agreed that was her understanding. Julie also explained that their daughter, Jenna, would need spacers and temporary implants. Shannon’s counsel indicated that he needed a release to speak to the orthodontist. He also indicated that he would pay \$600.00 that day toward the medical expenses to which he did not object. The court directed Julie to sign a release and directed Shannon to contact the orthodontist to determine whether the orthodontic treatment was medically necessary, which was to be accomplished within thirty days. Finally, the court awarded \$300.00 in attorney fees to Julie, noting that this was a motion for contempt and that she had requested \$500.00. The court indicated that it would not put the matter back on the docket unless the parties could not agree on a solution related to the orthodontic expenses. The parties also discussed visitation issues, which are not relevant to this appeal. At the conclusion of the hearing, the court entered a docket order memorializing its rulings.

On August 14, 2012, the court entered an order addressing the results of the July 31, 2012, hearing. The court again ordered Shannon to pay Julie \$600.00 on the date of the hearing, ordered Julie to sign a release for Shannon’s attorney to speak with Dr. Douglas Durbin regarding the medical necessity of braces for their children, and ordered Julie to provide all new bills to Shannon within fifteen days

with reimbursement to be made within fifteen days. The court addressed Shannon's visitation, the place of exchange, and the children's sporting activities. Finally, the court ordered Shannon to pay Julie \$300.00 toward her attorney fees.

On December 3, 2012, Julie renewed her motion for contempt and requested an additional award of attorney fees as well as an order directing Shannon to pay the outstanding orthodontic expenses. She attached an affidavit stating that pursuant to the court's earlier order, Shannon had paid her \$600.00 as ordered. She also stated that she had been directed to sign a release for Shannon's attorney to speak with Dr. Durbin about the children's braces, which she did on September 13, 2012. Once Shannon and his attorney spoke with Dr. Durbin to determine whether the braces were medically necessary, Shannon was supposed to either pay her or object to paying the balance of the bills. Julie indicated that she had obtained correspondence from Dr. Durbin explaining that braces were necessary and attached that documentation to the affidavit. She requested that the court direct Shannon to pay the remaining balance he owed for the out-of-pocket medical expenses as well as the \$300.00 in attorney fees the court had previously awarded. Finally, Julie requested that Shannon be ordered to pay his portion of the bills she had received since the last court order.

On January 22, 2013, Shannon filed a motion to recuse the circuit court judge, claiming that at the initial hearing, the judge "made statements concerning the medical necessity of such without hearing any evidence at that time and also

awarded an attorney fee to [Julie] prior to an adjudication of the merits of [her] Motion.”

On January 25, 2013, the court held a hearing, where the parties discussed the children’s orthodontic treatment. Julie’s counsel stated that he sent letters regarding the treatment in August, but Shannon had not done anything since then. Shannon’s counsel stated that they had talked with Dr. Durbin as well as Pikeville orthodontist Dr. Terry Wright regarding the medical records. He had not taken Dr. Wright’s deposition at that point. The court discussed the expenses Shannon would incur to take Dr. Wright’s deposition and that it would rather see the money go toward the medical bills. As it did in the prior hearing, the court indicated that it had some knowledge of and experience with the effects of missing eye teeth and the future medical complications that might result without treatment, including jaw problems and the collapse of the roof of the mouth. However, the court indicated that it would consider any filings by Shannon that provided otherwise. The court suggested getting the information by affidavit. Counsel for Shannon indicated that he could obtain Dr. Wright’s opinion and affidavit by Monday. The court directed counsel for Shannon to obtain the affidavit from Dr. Wright within ten days to see where he stood on the issue. If the result was that the braces were medically necessary and Shannon was unable to pay the entire sum at one time, the court indicated that it would give Julie a judgment of arrears with interest. If the opinion was that the braces were not needed, counsel for Shannon stated that an evidentiary hearing should be scheduled. The court indicated that it would wait for additional

information before it determined whether a hearing was necessary and opted to not reschedule the matter on the docket, but directed counsel to file a motion for a hearing if necessary.

On March 22, 2013, Julie moved the court to rule on her previously filed motions related to the payment of outstanding medical expenses. She stated that at the January 25, 2013, hearing, the court gave Shannon ten days to have a doctor review the medical reports to determine whether the expenses were necessary. There had been no further action on Shannon's part since that time.

The court held a hearing on May 24, 2013. The court indicated that it had not received any further information from Shannon's counsel. Counsel for Shannon, in turn, indicated that he had consulted with an oral surgeon but had not filed anything because Julie had not filed any evidence to support her position. Counsel for Shannon stated that he had spoken with Dr. Durbin, who stated that the dental treatment was elective. Furthermore, counsel for Shannon stated that the decision was a unilateral one on Julie's part.

The court reviewed its earlier ruling, and because Shannon failed to file an affidavit from Dr. Wright within the ten days allotted, it ruled that Shannon owed his portion of the disputed expenses. Counsel for Shannon again raised his motion to recuse based upon the court's ruling that the treatment was medically necessary before any evidence was filed. The court denied the motion, being unable to identify any grounds for recusal and pointed out that it had given Shannon the opportunity to rebut its statement. However, Shannon failed to present any proof

to contradict that ruling. Counsel for Shannon then asked the court for ten days to submit affidavits. The court denied this request, stating that it had been more than a year, that Shannon would have to spend considerable funds to take the depositions of the medical experts, and that Shannon had failed to file anything to rebut Julie's filings. The court again ordered Shannon to pay his portion of the orthodontic expenses and indicated that it would award \$600.00 in attorney fees to Julie. At Shannon's request, the court permitted him to pay the amount due at a rate of \$150.00 per month until paid in full. The court memorialized its rulings in a docket order.

On June 11, 2013, Julie filed documents from Dr. Durbin regarding the children's orthodontic treatment. The undated letter stated that "[t]he necessity of treatment is absolutely, unequivocally and unquestionably determined and dictated by the parameters set forth in the Standards of Care established (for decades) by The American Association of Orthodontists and The American Dental Association."

On June 19, 2013, the court entered a final order ruling on the orthodontic expense issue. The court stated:

There is no dispute as to the amount paid [by Julie] in medical expenses. There is no dispute that the dental work was done on the parties' two children. The only issue raised by [Shannon] is the necessity of the dental work done on the two children. With her initial motion, [Julie] attached copies of medical bills as well as correspondence to [Shannon] requesting that he reimburse her the medical bills. Included in that correspondence were two letters dated 8 December 2011

from the Kentucky Center for Orthodontics which performed the dental work on the two children. Both of those letters outline the children's diagnosis and treatment plan. Further, [Julie] filed in the record herein two letters from Dr. Douglas Durbin of The Kentucky Center for Orthodontics dated 14 August 2012 each of which explains the children's treatment plans and states that the treatment plan was necessary for functional and health related improvements. This court determined that [Julie] has met her burden of going forward and establishing the necessity of the dental work for the two children. Again, there is no dispute that the dental work was performed on the children and that the costs were incurred. Furthermore, [Shannon] has had a year to present some form of evidence, whether [it] be a deposition, an affidavit, letter, or even dental literature that would call into question the necessity of the braces for these children. [Shannon] has failed to file anything in the record to rebut the claims as made by [Julie.] This Court determines that [Shannon] owes [Julie] for the medical bills as incurred.

As a result, the court ordered Shannon to pay Julie the sum of \$2,569.38, which was the original amount due, less \$600.00 he had already paid and \$170.13 he had overpaid for 2012 medical bills. The court also found the \$600.00 award of attorney fees to be reasonable and sustained that award. The court permitted Shannon to make monthly payments of \$150.00 toward the amount he owed. This appeal now follows.

On appeal, Shannon argues that the circuit court should have recused and abused its discretion in ordering him to pay a portion of the orthodontic expenses without sufficient evidence and without holding an evidentiary hearing. Julie argues that there was no basis for the circuit court to recuse and that it properly ordered Shannon to pay his portion of the incurred expenses.

We shall first consider whether the trial judge should have recused. Shannon contends that the court had a personal bias related to the medical necessity of braces and was essentially testifying as an expert in that regard. On the other hand, Julie posits that the court was engaging in a discussion with Shannon's counsel regarding the medical necessity of braces and displaying common knowledge that some children need corrective braces based upon its review of the bills and letters from Dr. Durbin that Julie had submitted with her motion.

Kentucky Revised Statutes (KRS) 26A.015(2)(a) requires the disqualification of a judge in certain circumstances, including “[w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings, or has expressed an opinion concerning the merits of the proceeding[.]” In *Bissell v. Baumgardner*, 236 S.W.3d 24 (Ky. App. 2007), this Court made it clear that “[t]he burden of proof required for recusal of a trial judge is an onerous one.” *Id.* at 28-29, quoting *Stopher v. Commonwealth*, 57 S.W.3d 787, 794 (Ky. 2001). The Court went on to confirm that “[t]here must be a showing of facts ‘of a character calculated seriously to impair the judge's impartiality and sway his judgment.’” *Id.* at 29, quoting *Stopher*, 57 S.W.3d at 794. “A party's mere belief that the judge will not afford a fair and impartial trial is not sufficient grounds to require recusal.” *Webb v. Commonwealth*, 904 S.W.2d 226, 230 (Ky. 1995) (citation omitted).

Here, we agree with Julie that Shannon did not meet the heavy burden to require the circuit judge's recusal in this case. Her statements throughout the multiple proceedings established that she had some generalized personal knowledge of dental health, but she did not evidence any bias or knowledge related to this particular case. She had certainly reviewed the documents Julie filed with her motions seeking reimbursement, which included the diagnoses for both children and the need for corrective braces. Furthermore, she gave Shannon every opportunity to provide his own evidence to establish his claim that the braces were not medically necessary. That Shannon chose not to do so does not create a bias on the part of the circuit judge. Therefore, we agree with Julie that there was no basis for the circuit judge to recuse in this case.

Next, we shall consider Shannon's argument that the circuit court abused its discretion in ordering him to pay his portion of the orthodontic expenses. This Court's opinion in *Downing v. Downing*, 45 S.W.3d 449 (Ky. App. 2001), provides our standard of review in matters concerning child support. "A reviewing court should defer to the lower court's discretion in child support matters whenever possible. . . . However, a trial court's discretion is not unlimited. The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.* at 454 (footnotes omitted).

KRS 403.211(9) addresses the allocation of a child's extraordinary medical expenses:

The cost of extraordinary medical expenses shall be allocated between the parties in proportion to their combined monthly adjusted parental gross incomes. “Extraordinary medical expenses” means uninsured expenses in excess of one hundred dollars (\$100) per child per calendar year. “Extraordinary medical expenses” includes but is not limited to the costs that are reasonably necessary for medical, surgical, dental, orthodontal, optometric, nursing, and hospital services; for professional counseling or psychiatric therapy for diagnosed medical disorders; and for drugs and medical supplies, appliances, laboratory, diagnostic, and therapeutic services.

Pursuant to the terms of their settlement agreement as adopted by the circuit court, the parties agreed to a 56%/44% split between Shannon and Julie of the cost of extraordinary medical expenses, including orthodontic treatment.

Shannon contends that Julie did not meet her burden of proof that the orthodontic treatment was medically necessary. Kentucky Rules of Civil Procedure (CR) 43.01(2) provides that, “[t]he burden of proof in the whole action lies on the party who would be defeated if no evidence were given on either side.” Shannon argues that Julie did not produce sufficient evidence to establish the medical necessity of the children’s braces. We disagree. Julie provided the billing statements as well as letters from Dr. Durbin outlining the children’s respective diagnoses and treatment plans and stating that such treatment was “necessary for functional and health related improvements.” Shannon spends considerable time arguing that Dr. Durbin’s later correspondence expressed his opinion that such treatment was merely elective. To the contrary, Dr. Durbin stated:

The necessity of treatment is absolutely, unequivocally and unquestionably determined and dictated by the parameters set forth in the Standards of Care established (for decades) by The American Association of Orthodontists and The American Dental Association. Whenever a child has a congenital malformation of bone structure or congenitally missing structures, it is (and always has been) considered medically necessary to render corrective surgery, orthopedics, orthodontics, implants, crowns or all of the aforementioned to restore the child's anatomy and function to normal.....
PERIOD!!

Shannon failed to offer any evidence to rebut Julie's claims.

Shannon also contends that he was denied a hearing and fair evidentiary determination. However, Julie cites to 11 Ky. Prac. Civ. Proc. Forms § 37:11, which addresses the use of affidavits with motions:

CR 43.12 provides that when a motion is based on facts not appearing of record, the court may hear the matter on affidavits. According to CR 6.04(2), motions may be supported by affidavits which must be served with the motion. . . . The function of the affidavits is to supply the judge with reliable evidence of facts to support the order granting the motion. This evidence under oath is particularly important if there are no other facts in the record and if the common practice of not taking testimony at the hearing of the motion is followed.

Here, Julie provided her own affidavit establishing that she had paid for the children's orthodontic treatment and that she had contacted Shannon to obtain reimbursement for his portion pursuant to their agreement. She also included the billing statements, proof of payment, and letters from Dr. Durbin detailing the diagnoses and treatment plans for the children. Despite having many months to do

so, Shannon did not present any evidence to contradict Julie's documentation or even move for an evidentiary hearing, as the court instructed him to do.

Therefore, the court did not abuse its discretion in ordering Shannon to pay his portion of the orthodontic expenses without first holding an evidentiary hearing. We also hold that the circuit court's ruling is supported by sufficient evidence.

For the foregoing reasons, the order of the Rowan Circuit Court is affirmed.

MOORE, JUDGE, CONCURS.

NICKELL, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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