NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 CA 1590

T.D.

VERSUS

F.X.A.

Judgment Rendered: MAY 22 2014

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APPEALED FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF ST. TAMMANY
STATE OF LOUISIANA
DOCKET NUMBER 99-13466

HONORABLE DAWN AMACKER, JUDGE

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BEFORE: KUHN, PETTIGREW, McDONALD, McCLENDON, AND HIGGINBOTHAM, JJ.

Disposition: APPEAL DISMISSED.

Pettigrew, J. Dissents for the Reasons assigned by Judge McDonald

McDonald dissents and assigns reasons.

KUHN, J.

This is an appeal of a district court judgment finding it was in the best interest of a teenage girl (V.D.) that she attend a boarding school located in Utah at her father's request and against her mother's strenuous objection. For the following reasons, we find that this matter presents no justiciable issues and dismiss this appeal as moot.[1]

DISCUSSION

T.D. (mother) and F.X.A. (father) are the parents of V.D., who was nearly sixteen years old at the time the judgment on appeal was rendered.[2] V.D.'s parents were never married to each other and have had an extremely acrimonious relationship. F.X.A. filed a rule on June 3, 2011, requesting that he be designated V.D.'s domiciliary parent and seeking the court's permission to send her to a therapeutic boarding school in Utah. Following a hearing, the district court signed a written judgment finding it was in V.D.'s best interest that she attend the boarding school and ordering T.D. to encourage her to do so. T.D. appealed, arguing in five assignments of error that the district court abused its discretion in ordering that V.D. attend the boarding school, in not holding the trial open to receive the testimony of V.D.'s treating psychiatrist, and in threatening T.D. with the loss of custody if she failed to encourage V.D. to attend the boarding school.

We pretermit consideration of the issues raised by T.D., concluding that they are moot. Given that cases submitted for adjudication must be justiciable, it is well settled that courts will not decide moot controversies. A "justiciable controversy"

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[1] In a related appeal, this Court reversed a district court judgment involving the same parties that awarded F.X.A. sole custody of V.D. and held T.D. in contempt of court. ***T.D. v. F.X.A.***, 13-0453 (La. App. 1st Cir. 1/9/14), ____ So.3d ____, writ denied, 14-0189 (La. 2/6/14), 132 So.3d 958.

[2] Pursuant to the Uniform Rules–Courts of Appeal, Rules 5-1(b) and 5-2, the initials of the parties will be used to protect and maintain the privacy of V.D., who was a minor at the time of rendition of judgment.

is one presenting an existing actual and substantial dispute involving the legal relations of parties who have real adverse interests and upon whom the judgment of the court may effectively operate through a decree of conclusive character. A "justiciable controversy" is thus distinguished from one that is hypothetical or abstract, academic, or moot. ***Louisiana State Board of Nursing v. Gautreaux***, 09-1758 (La. App. 1st Cir. 6/11/10), 39 So.3d 806, 811, writ denied, 10-1957 (La. 11/5/10), 50 So.3d 806. An issue is moot when a judgment on that issue has been deprived of practical significance or made abstract or purely academic, and it can serve no useful purpose and give no practical relief. When a case is moot, there is no subject matter on which the judgment of the court can operate. ***Louisiana State Board of Nursing***, 39 So.3d at 811.

Further, a justiciable controversy normally must exist at every stage of the proceeding, including appellate stages. Even if the requirements of justifiability are satisfied when the suit initially is filed, when the fulfillment of these requirements lapses during the pendency of the litigation, the suit becomes moot and there is no longer an actual controversy for the court to address. In that case, any judicial pronouncement on the matter would be an impermissible advisory opinion. ***Louisiana State Board of Nursing***, 39 So.3d at 811-12.

In this case, it was undisputed during oral arguments before this Court that V.D. was refused admission to the boarding school in Utah that was the subject of the district court's order. Therefore, all issues related to the district court's decision that it was in V.D.'s best interests to attend that particular school were rendered moot by the impossibility of her doing so. Any decision rendered by this Court on these issues could serve no useful purpose nor give any practical relief, since the school had declined to accept V.D. for admission. Accordingly, the issues raised in this appeal are moot, and any opinion rendered by this Court would be an impermissible advisory opinion.

MOTION TO STRIKE AND FOR SANCTIONS

F.X.A. filed a motion to strike and for sanctions with this Court, asserting that portions of T.D.'s brief contained references to materials that are not contained in the appellate record. He requests that those portions of the brief be stricken and that T.D. be sanctioned pursuant to Uniform Rules, Courts of Appeal, Rule 2-12.13.

Uniform Rules-Courts of Appeal, Rule 2-12.13, which addresses non-compliant briefs, provides that, "[b]riefs not in compliance with these Rules may be stricken in whole or in part by the court, and the delinquent party ... may be ordered to file a new or amended brief." Thus, the sanctions to be imposed for a non-conforming brief under this rule consists of the court either striking the brief in whole or in part or ordering the party to file a new or amended brief. Which sanction to impose is left to the discretion of the court. See ***Richardson v. North Oaks Hospital***, 11-1258 (La. App. 1st Cir. 2/13/12), 91 So.3d 361, 364. In the instant case, however, all issues related to T.D.'s brief have been rendered moot by our conclusion that the appeal taken by T.D. is moot. Accordingly, the motion is moot as well.

CONCLUSION

For the foregoing reasons, this appeal is dismissed, with each party to bear their own costs.

APPEAL DISMISSED.

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McDONALD, J., DISSENTING:

I respectfully dissent. Based on the assertions made in oral argument to a five-judge panel[1] that V.D. did not attend the out-of-state school in Utah, the majority concludes that there are no justiciable issues remaining. I respectfully disagree. After a hearing, the district court ruled that: F.X.A. overcame the presumption set forth in La. R.S. 9:335(B)(3), and it was in the best interest of V.D. to attend Diamond Ranch Academy in Utah; that F.X.A. was responsible for all of the school expenses, including but not limited to tuition, transportation costs, any required courses, activities, or treatment; that both parents shall encourage V.D. to attend the school, and that if the court determined that T.D. failed to meet this requirement, it would consider a change of custody of V.D. to F.X.A.; and further, that as a requirement for V.D. to attend the school, within the next three weeks F.X.A. would visit the school to ensure himself that he was satisfied with the facility; and that if T.D. wished to visit the school, F.X.A., according to his stipulation in open court, would pay for the cost of her plane ticket. That judgment was signed on February 13, 2012.

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[1] The case was originally argued before a three-judge panel. When they could not agree on a final disposition, two additional judges were assigned to the case. The original argument was held in March 2013. Even though V.D. did not attend the school in Utah in June 2012, no mention of this fact was forthcoming during this argument by either counsel. It was not until the case was re-argued some seven months later in October 2013 that this information was disclosed.

T.D. filed a motion for a suspensive appeal from that judgment. F.X.A. filed an opposition to the motion for suspensive appeal. Her motion was denied by the district court. T.D. then filed for an application for supervisory writs and a request for stay with this court. In **T.D. v. F.X.A.**, 2012 CW 0458 (La. App. 1 Cir. 3/23/12), the writ was denied and the motion for stay was denied on the showing made. This court stated:

> Although the decision of [T.D.] to maintain the minor child, V.D., within a school in this state rather than to enroll her in a school located in another state was subject to the presumption that it was in V.D.'s best interest under La. R.S. 9:335B(3), the trial court decreed that [F.X.A.] overcame this presumption based on the testimony presented at the January 25, 2012 hearing. Accordingly, the judgment "relates to custody" as contemplated by La. C.C.P. art. 3945, and in accordance with its provisions, "an appeal shall not suspend execution of the judgment."

T.D. then filed an application for rehearing with this court, with a request for additional time to provide a brief in support of the application. The application for rehearing was not considered, and the request for additional time to provide a brief was denied as moot. **T.D. v. F.X.A.**, 2012 CW 0458 (La. App. 1 Cir. 4/27/12). T.D. then filed an application for supervisory and/or remedial writs and a request for a stay with the Louisiana Supreme Court, which were denied. **T.D. v. F.X.A.**, 2012 CC 0909 (La. 5/25/12). T.D. then filed a devolutive appeal.

T.D. makes the following assignments of error: (1) the district court abused its discretion and committed manifest error by concluding that F.X.A. overcame the La. R.S. 9:335(B)(3) presumption; (2) the district court abused its discretion and committed manifest error by disregarding the only expert who testified, which expert stated that boarding school was not in V.D.'s best interest; (3) the district court abused its discretion and committed manifest error by ruling that the Utah boarding school placement was in V.D.'s best interest with no factual support; (4) the district court abused its discretion and manifestly erred by threatening T.D. with the loss of custody if she failed to encourage V.D. to attend the boarding

school; and (5) the district court abused its discretion by refusing to hold the trial open for the testimony of V.D.'s treating psychiatrist.

ASSIGNMENTS OF ERROR NOS. 1, 2, 3 AND 5

In these assignments of error, T.D. asserts that the district court abused its discretion and committed legal error: by concluding that F.X.A. met the legal burden of overcoming the La. R.S. 9:335(B)(3) presumption; by disregarding the testimony of the only expert, who testified that boarding school was not in V.D.'s best interest; by ruling that the boarding school was in V.D.'s best interest, without factual support; and the trial court abused its discretion by refusing to hold open the trial for the testimony of V.D.'s treating psychiatrist, Dr. William F. Colomb, Jr. Arguably, the majority is correct and these assignments of error are moot since V.D. did not attend the school in Utah and the findings in that regard are no longer relevant.

ASSIGNMENT OF ERROR NO. 4

I believe this assignment of error still presents a justiciable controversy and is not moot. In this assignment of error, T.D. asserts that the district court abused its discretion and manifestly erred by threatening her with the loss of custody if she failed to encourage V.D. to attend the Utah boarding school.

The judgment states:

> IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that both parents, [T.D.] and [F.X.A.], shall encourage [V.D.] to attend this school and that if the Court determines that Plaintiff, [T.D.], fails to meet this requirement, it will consider a change of custody of [V.D.] to Defendant, [F.X.A.]

It is a well recognized tenet of Louisiana jurisprudence that an award of child custody is not a tool to regulate human behavior. **Cleeton v. Cleeton**, 383 So.2d 1231 (La. 1979). The district court has effectively rendered an advisory opinion and suspended its application. See **Hensgens v. Hensgens**, 94-1200 (La.App. 3 Cir. 3/15/95), 653 So.2d 48, 51, writ denied, 95-1488 (La. 9/22/95),

660 So.2d 478. This also begs the question of what T.D. was supposed to do if she determined that the school was not the best place for her daughter. If she attempted to convey this information to anyone, she would run the risk of being afoul of the court's order that she encourage her daughter to attend the school. This makes the suggestion that she visit the school meaningless. Therefore, I believe this assignment of error has merit.

For these reasons I believe the majority is incorrect in finding all five assignments of error are moot. I believe assignment number four is still viable and would reverse the judgment of the district court in this regard.