

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

CASEY S. v. TARAH L.

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CASEY S., APPELLEE,
V.
TARAH L., APPELLANT.

Filed December 31, 2012. No. A-12-265.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed.
Kelly T. Shattuck, of Vacanti Shattuck, for appellant.
Nancy S. Freburg for appellee.

INBODY, Chief Judge, and SIEVERS and RIEDMANN, Judges.
RIEDMANN, Judge.

I. INTRODUCTION

Tarah L. appeals an order of the Buffalo County District Court granting Casey S. full custody of their minor child, Sawyer L., and ordering her to pay child support. Tarah argues on appeal that the court abused its discretion in awarding Casey custody, limiting her regular parenting time, and refusing to decrease her child support obligations despite the financial burden of exercising her visitation rights. We disagree. Accordingly, we affirm the order of the trial court.

II. BACKGROUND

Casey and Tarah are the biological parents of Sawyer. Sawyer was born in Missouri in May 2007. Nine days before Sawyer's birth, Tarah asked Casey to move to Missouri to live with her. Casey and Tarah lived in Missouri together until July 2007. At that point, Casey moved to Nebraska and the parties informally arranged for alternating custody. In September 2008, Tarah moved in with Casey in Kearney, Nebraska, and Sawyer resided with them. This living arrangement continued until early June 2009.

In June 2009, Tarah left Kearney with Sawyer. Casey and Tarah dispute the circumstances surrounding her departure. Tarah testified that she and Casey had an understanding about splitting custody before she left. She said she assumed that she would raise Sawyer through school and that Casey would get summers and holidays. Casey said he and Tarah discussed possibly moving Tarah to Grand Island, but had not finalized any plans. He testified that he had no idea Tarah was leaving until his roommate called him at work after observing Tarah in the process of moving out. Casey stated that he was surprised and left work immediately to try to find her. He said that she did not allow him to see or contact Sawyer and that he had no idea where they were living.

Tarah called Casey in late July 2009 to tell him that she was going to Sturgis, South Dakota, to make money to pay her bills. On her way to Sturgis, Tarah transferred Sawyer to Casey in Nebraska City, Nebraska, and Casey paid Tarah about \$700. Casey and Tarah dispute the reasons for the custody exchange and financial transaction. Casey alleges Tarah called him out of the blue and threatened to take Sawyer to Sturgis unless he paid her money. He said he felt compelled to pay her to prevent her from taking Sawyer into a dangerous situation. Tarah testified that she contacted Casey in order to give him custody for his planned summer visitation. She said that she asked Casey for money to account for 2 months of child support.

1. TEMPORARY CUSTODY LITIGATION

That same month, Casey filed a petition for paternity and full custody in the Buffalo County District Court. Casey attempted to serve Tarah with the complaint and petition at multiple addresses in Nebraska and Missouri, but service failed. In August 2009, the Buffalo County District Court issued an ex parte order finding Casey to be the biological father of Sawyer and awarding him temporary full custody subject to Tarah's supervised visitation. Casey finally achieved service on Tarah when she showed up at his house in August to collect her belongings.

In September 2009, the court reaffirmed its ex parte decision to award Casey temporary full custody until it could hold a full hearing on custody. The hearing on temporary custody was continued at Tarah's request many times. Throughout the course of litigation, both parties filed multiple discovery motions and ex parte motions to modify custody.

In December 2009, the court held a hearing on temporary custody and awarded Casey temporary full custody subject to Tarah's parenting time of 1 week per month. The court also ordered child support. It required Tarah to pay \$422 each month in basic support and required Casey to pay Sawyer's health insurance premiums and the first unreimbursed \$480 of health care expenses. Thereafter, the court ordered the parties to split the remaining health care costs and all daycare costs, with Casey paying 60 percent and Tarah paying 40 percent.

In July 2010, the court granted Casey's motion to have the parties submit to a psychological and custodial evaluation conducted by Dr. John Meidlinger.

2. SEXUAL ABUSE ALLEGATIONS

In October 2011, Tarah became concerned that Casey was sexually abusing Sawyer after Sawyer made peculiar statements to her including, "suck my wiener" and "daddy drinks my pee," during a visitation. Tarah had Sawyer examined several times by medical professionals.

Reports from those professionals led both Nebraska and Missouri to launch police investigations. In conjunction with the investigations, Tarah filed an ex parte motion to modify the court's temporary custody order based on allegations that Casey sexually abused Sawyer. The court granted her ex parte motion and awarded her temporary custody for the duration of the investigations.

After the investigations failed to substantiate the sexual abuse allegations against Casey, the court denied Tarah's motion for a temporary change in custody and ordered her to return Sawyer to Casey. Tarah refused to comply with the order, and Casey filed a motion for contempt. Around the same time, the Kearney Police Department issued a warrant for Tarah's arrest based on her failure to return Sawyer to Casey's custody. The Franklin County Sheriff's Department arrested Tarah and transferred Sawyer to Casey.

3. MOTION TO RECUSE CASEY'S COUNSEL

In January 2012, Tarah moved to recuse Casey's counsel. Tarah argued the court should recuse Casey's counsel because her husband worked in the county attorney's office and the county attorney had prosecuted Tarah for violating a custody order in October 2011.

At the hearing on the motion to recuse, Tarah alleged that Casey's counsel contacted the county attorney's office. Casey's counsel denied any contact. Tarah argued that even if Casey's counsel did not intervene, the situation had an "appearance of impropriety." The county attorney's office applied for a special prosecutor to handle the county's interest in any future proceedings in December 2011, and that request was granted.

The trial court found no conflict that required Casey's attorney to recuse herself. The court noted that it had received information from the county attorney's office that Casey's counsel's husband was not in an area of practice dealing with criminal prosecution. The court found only two ethical rules addressing a conflict between an attorney and an opposing party. The first, "DR 7-105," prohibits an attorney from using or threatening criminal litigation "solely to obtain an advantage in a civil matter." See Canon 7, DR 7-105, of the Code of Professional Responsibility. The second, "Canon #9," prohibits "the appearance of impropriety." See Canon 9 of the Code of Professional Responsibility. We note that Nebraska's Code of Professional Responsibility was for conduct occurring prior to September 1, 2005, and that the Nebraska Code of Judicial Conduct then became effective for conduct occurring on or after September 1, 2005. Here, the conduct complained of occurred on January 10, 2012, and thus, the Nebraska Code of Judicial Conduct should apply. However, since the trial court referenced the Code of Professional Responsibility, for purposes of this opinion, we will too. The court found that neither of those rules required Casey's counsel to recuse herself. It held that even if Casey's counsel had communicated with the county attorney's office, that communication would not have been "solely" to gain an advantage in a civil matter. Furthermore, the court stated that any potential appearance in impropriety was cured by appointing a special prosecutor.

4. CUSTODY HEARING

The court held a custody hearing in February 2012. Several witnesses testified at the hearing, including Dr. Meidlinger, the expert who performed a psychological and custodial evaluation. Dr. Meidlinger recommended awarding custody to Casey. He opined that Sawyer

needed a patient parent who would administer nonphysical discipline. He liked the way Sawyer calmly interacted with Casey and thought Casey had done a good job implementing successful disciplinary procedures. Dr. Meidlinger was less confident in Tarah's abilities to parent Sawyer, because she had been subject to "extreme domestic violence" and because he received reports that she was emotionally unstable and had difficulty controlling her anger.

Dr. Meidlinger was concerned by Sawyer's language disorder and stressed the importance of focusing on it. He said literature suggests children who begin school behind in language never catch up to their peers academically. Based on his concerns about Sawyer's language abilities, he recommended that the court limit Tarah's regular visitation to 20 weekends per year so that Sawyer could remain in preschool the entire month and have a regular routine. He recommended that Tarah's visits take place in Kearney, during the school year. He explained that, in his opinion, making Sawyer frequently travel between Casey's and Tarah's residences would be counterproductive to either party developing a good relationship with Sawyer.

Sawyer's daycare provider, speech pathologist, and a teacher at his school all testified at trial. The daycare provider testified that Sawyer's interaction with Casey was very good and that Casey understood Sawyer well. She said that Casey provided her with advice on how to get Sawyer's attention when he misbehaves. She testified that Sawyer had not exhibited any behavior during daycare that would make her concerned he was being sexually abused. There was one instance, however, where she was in the next room and heard either Sawyer or another child say "suck my wiener." She testified that she stopped them and corrected them and that there had not been any other trouble.

Sawyer's speech pathologist testified that she works with Sawyer on language deficits. She testified that he struggles to express himself and needs to increase his receptive language. She stated that Sawyer had made significant progress, partially because Casey had been working with the school to implement procedures at home that would reinforce everything Sawyer was learning at school. She testified, however, that when Sawyer returns from a week in Missouri, he has fluency issues and it takes him a little while to get "back in the groove." She was unsure whether Sawyer would be ready to start kindergarten and recommended that his work on speech and communication extend into the month of June.

She also testified that Sawyer often hears someone say something and then repeats it as if it is his own story. She provided several examples of Sawyer doing this. She stated that Sawyer frequently misinterprets details and that he would be particularly susceptible to having someone plant ideas in his head. Another teacher agreed with these observations.

A former roommate of Casey's, who also lived with both Casey and Tarah while they were in Kearney, testified generally to the strengths in Casey's character and the weaknesses in Tarah's, including her anger issues. A youth pastor at a Kearney church testified to Casey's character reformation and described him as a role model for new fathers in the church. Several of Casey's friends and family members testified to Casey's character strengths and Tarah's respective weaknesses; conversely, Tarah, a friend, and her family testified oppositely.

5. CUSTODY AWARD

The court found that there were "pluses and minuses" to awarding either parent custody. The court noted that both parties seemed "aware of Sawyer's limitations" and "actively

concerned in his physical, intellectual, and behavioral development.” The court opined that Sawyer was improving in Casey’s custody, but it noted that programming to help him continue to improve would be available in Missouri as well. The court took note of Dr. Meidlinger’s report and opinion that Casey provided Sawyer with greater emotional stability and had a greater ability to assist Sawyer with behavioral progress. The court mentioned that both parties had histories of immaturity and had presented evidence of personal reformation, but it found Casey’s reformation to be “substantially greater” than Tarah’s. In particular, the court found that Tarah’s refusal to accept the results of the investigations conducted in Nebraska and Missouri and her treatment of Sawyer’s physician suggested that she is more volatile than Casey. The court stated that her actions also suggest she will not be supportive of Casey’s parenting time.

The court awarded Casey permanent, full custody subject to Tarah’s parenting time. Tarah received some holidays, school vacations, 4 consecutive weeks in the summer, and up to 20 weekends per year to be exercised within 120 miles of Kearney. The court explained that traditional visitation was unfeasible because the parties were separated by 12 hours of distance. Evidence showed that the previous arrangement, wherein Tarah was awarded 1 week of custody each month, interrupted Sawyer’s education and therapy progress. The court ordered the parties to split necessary transportation costs for extended holidays.

The court also ordered child support. It required Tarah to pay \$415 per month in basic child support. Casey was ordered to maintain Sawyer’s health insurance and pay the first \$480 of unreimbursed medical expenses. The court thereafter required the parties to split additional medical expenses and all daycare expenses, with Casey paying 53 percent and Tarah paying 47 percent.

III. ASSIGNMENTS OF ERROR

Tarah argues, condensed and restated, that the trial court abused its discretion in failing to (1) recuse Casey’s counsel, (2) award Tarah custody or assign her more regular parenting time, and (3) decrease Tarah’s child support obligation based on the transportation costs associated with exercising her parenting time.

IV. ANALYSIS

1. FAILURE TO RECUSE CASEY’S COUNSEL

Tarah first argues that the trial court erred in failing to find that a conflict of interest between Casey’s counsel and the county attorney required Casey’s counsel to withdraw from the the custody dispute. Tarah argues that Casey’s counsel violated ethical canons by initiating criminal prosecution solely to gain advantage in a civil matter and that her marriage to an attorney in the county attorney’s office creates an “appearance of impropriety.” We disagree.

(a) DR 7-105

We note that in this case, Casey’s counsel claims she had no contact with the county attorney. The trial court did not make a finding of fact as to whether or not Casey’s counsel contacted the county attorney. Instead, the trial court held that even if Casey’s counsel contacted the county attorney’s office, that contact would not have violated DR 7-105. Because the trial

court was correct in its determination, we also do not need to make a factual determination as to whether or not Casey's counsel contacted the county attorney's office.

A recusal motion is addressed to the discretion of the trial judge. *State v. Hubbard*, 267 Neb. 316, 673 N.W.2d 567 (2004). Tarah first argues that DR 7-105 should have prevented Casey's counsel from representing Casey in the custody dispute. DR 7-105(A) states that "[a] lawyer shall not present, participate in presenting, or threaten to present criminal charges *solely* to obtain an advantage in a civil matter." (Emphasis supplied.) This ethical canon requires attorneys to refrain from using the criminal process solely as a means to an end in civil litigation. "Threatening to use, or using, the criminal process to coerce an adjustment of private civil claims or controversies is a subversion of [the] process" *State ex rel. Nebraska Bar Assn. v. Gobel*, 201 Neb. 586, 589, 271 N.W.2d 41, 42 (1978).

In this instance, Tarah violated a court order requiring her to return Sawyer to Casey's custody. Violating a custody order is a criminal violation that is completely separate from any civil case to determine custody. The county attorney has the responsibility for prosecuting violations of custody orders in order to enforce the criminal code.

There is no evidence that Casey sought to enforce the court order for any reason other than its own end, and Tarah does not explain how the criminal prosecution was actually used to gain leverage in the civil case. Accordingly, even if we assumed *arguendo* that Casey's counsel had contacted the county attorney's office to report Tarah's violation of a court order, the conduct would not violate DR 7-105.

(b) Canon 9

Canon 9 of the Code of Professional Responsibility is an ethical canon governing the legal profession. It states that a lawyer should avoid even the "appearance of impropriety." Canon 9 is discussed most often in the context of one attorney or law firm representing the opponent of a former client. This representation may create the "appearance of impropriety" because the client's previous confidential disclosures could be used against the client in the current litigation. See *State ex rel. FirstTier Bank v. Buckley*, 244 Neb. 36, 503 N.W.2d 838 (1993). In certain cases, the Nebraska Supreme Court has found that a law firm's use of a screening mechanism avoids the "appearance of impropriety." *Id.* A screening mechanism is a procedure or structure for identifying attorneys who may have had involvement in a client's former case and prohibiting them from improperly communicating with attorneys now representing the client's opponent. See *id.* Effective screening mechanisms are an appropriate balance in the age of the "new philosophy of pragmatism which balances the expectations of confidentiality of a former client against the importance of allowing a client the representation of his choice and promoting the mobility of attorneys" *State ex rel. Freezer Services, Inc. v. Mullen*, 235 Neb. 981, 991-92, 458 N.W.2d 245, 252 (1990).

Although this case does not involve a law firm switching sides of a case, it implicates the same core values. Concerned about the appearance of impropriety, the Buffalo County Attorney's Office erred on the side of caution and appointed a special prosecutor to handle the county attorney's interest in the case in December 2011. Appointing a special prosecutor who had no connection to Casey's counsel was an effective screening mechanism that ensured Casey's counsel did not have access to improper information from the county attorney's office

while preparing for the custody case. Regardless of whether or not Casey's counsel's marriage to an attorney in a separate division of the county attorney's office appeared improper, this pragmatic solution thoroughly eliminated any "appearance of impropriety" that may or may not have existed.

Because we find that allowing Casey's counsel to represent Casey in the custody hearing violated neither DR 7-105 nor Canon 9, the trial court did not abuse its discretion in allowing Casey's counsel to represent Casey at trial.

2. CUSTODY DETERMINATION AND PARENTING TIME

Second, Tarah argues that the trial court erred in granting Casey custody and in failing to award her more parenting time. We find ample justification for the trial court's custody award and parenting time determination. Accordingly, we affirm the judgment of the trial court.

In a filiation proceeding, we review questions concerning child custody determinations *de novo* on the record to determine whether the trial court abused its discretion. *Spence v. Bush*, 13 Neb. App. 890, 703 N.W.2d 606 (2005). A judge has abused his discretion when he acts or refrains from acting and the selected option results in an untenable decision that unfairly deprives a litigant of a substantial right or just result. *Wild v. Wild*, 13 Neb. App. 495, 696 N.W.2d 886 (2005).

The standard for determining custody is parental fitness and the child's best interests. *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006). Nebraska's Parenting Act states that it is in the best interests of the child to have a "safe, stable, and nurturing environment." Neb. Rev. Stat. § 43-2921 (Reissue 2008). To determine the best interests of a child, a court must consider, at a minimum: (1) the relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing; (2) the desires and wishes of the minor child if of an age of comprehension regardless of chronological age, when such desires and wishes are based on sound reasoning; (3) the general health, welfare, and social behavior of the minor child; and (4) credible evidence of abuse inflicted on any family or household member. Other pertinent factors include the moral fitness of the child's parents, including sexual conduct; respective environments offered by each parent; the age, sex, and health of the child and parents; the effect on the child as a result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; and the parental capacity to provide physical care and satisfy educational needs of the child. *Robb v. Robb*, 268 Neb. 694, 687 N.W.2d 195 (2004). When the evidence conflicts, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Hajenga v. Hajenga*, 257 Neb. 841, 601 N.W.2d 528 (1999).

(a) Custody Award

The parties argue extensively about their respective qualifications for receiving primary custody of Sawyer. The evidence showed that both parents took an active interest in parenting Sawyer and that each parent retained primary custody at different points throughout the proceedings. The witnesses at trial provided testimony tending to show that both parents have a good relationship with Sawyer as required under the first prong of § 43-2921. With respect to the second prong of § 43-2921, Sawyer's preferences are not at issue in this case.

The third consideration required under § 43-2921 is the child's "general health, welfare, and social behavior." Both parents presented substantial evidence related to Sawyer's welfare. Specifically, both parties presented, and the trial court considered, testimony about the various character strengths and the other parent's various character flaws. Ultimately, the trial court was persuaded by Dr. Meidlinger's indepth report and recommendation on custody, as well as the testimony of the witnesses at trial.

Dr. Meidlinger found that Sawyer flourished under Casey's care. He noted several instances where Tarah displayed immaturity while dealing with caregivers or authorities. In particular, Dr. Meidlinger pointed to some of Tarah's interactions with Casey's pediatrician, including an interaction where Tarah stated that she could not be alone with Sawyer because she was afraid she might hurt him, as an objective confirmation of some of Tarah's struggles parenting Sawyer.

Conversely, the trial judge was impressed with Casey's personal reformation and improvement since becoming a father. The trial court took special note of the youth pastor's testimony about Casey's moral character. The trial court was also impressed by Casey's active involvement in Sawyer's education as noted by Sawyer's daycare provider, speech pathologist, and a teacher in Sawyer's school. This evidence supports the trial court's conclusion that awarding full permanent custody to Casey is in Sawyer's best interests because it will better support flourishing in Sawyer's "general health, welfare, and social behavior." See § 43-2921.

With respect to the fourth required prong of § 43-2921, the investigation into sexual abuse of Sawyer by Casey was not substantiated.

Evidence adduced at trial, therefore, supports the trial court's finding that awarding Casey full permanent custody of Sawyer is within Sawyer's best interests and was not an abuse of discretion.

(b) Parenting Time

Tarah also challenges the portion of the trial court's custody award determining the parties' respective parenting time. In particular, Tarah argues that the evidence presented at trial did not warrant reducing her parenting time from the amount awarded at the temporary hearing in December 2009. Although it is unfortunate that the parties' living situation does not allow for both parents to have more time with Sawyer, the evidence at trial showed his educational needs require limiting his trips to Missouri. Accordingly, the trial court did not abuse its discretion in limiting Tarah's regular parenting to 20 weekend visitations to be exercised within 120 miles of Kearney.

The trial court limited Tarah's parenting time based on testimony from educators and caregivers about Sawyer's educational needs. His teacher and speech pathologist testified that his speech progress regresses after spending a week away from preschool while visiting Tarah. Based on his need for structure, the trial court limited visitation that interfered with his school schedule. Furthermore, the trial court found that requiring Sawyer to spend 24 hours in the car for a weekend visitation was counterproductive to his well-being. This evidence supported the trial court's decision that limiting Tarah's regular parenting time to 20 weekends to be exercised within 120 miles of Kearney was in Sawyer's best interests. We cannot say that it was an abuse

of discretion to limit Tarah's parenting time in order to accommodate Sawyer's educational and developmental needs.

3. CHILD SUPPORT ORDER

Finally, Tarah argues that the trial court erred in failing to decrease her child support obligation based on the expenses associated with exercising her parenting time. We disagree.

An appellate court will uphold a trial court's child support award absent an abuse of discretion. *Lawson v. Pass*, 10 Neb. App. 510, 633 N.W.2d 129 (2001). In general, child support guidelines should be set according to the Nebraska Child Support Guidelines. Neb. Ct. R. § 4-204; *Citta v. Facka*, 19 Neb. App. 736, 812 N.W.2d 917 (2012). A trial court may deviate from the Nebraska Child Support Guidelines when a parent must pay "substantial and reasonable long-distance transportation costs directly associated with visitation or parenting time." Neb. Ct. R. § 4-210.

Although a trial court has the discretion to consider transportation costs associated with visitation, no authority requires trial courts to deviate from the Nebraska Child Support Guidelines when a parent faces those expenses. See § 4-210. See, also, *Stelko v. Larson*, No. A-10-516, 2011 WL 2206909 (Neb. App. June 7, 2011) (selected for posting to court Web site); *Brooks v. Brooks*, No. A-08-1132, 2009 WL 3161455 (Neb. App. Sept. 29, 2009) (selected for posting to court Web site). In this case, the parties do not dispute that Tarah's support obligation is within the Nebraska Child Support Guidelines.

While we note that the parties will split some transportation costs, in this case, Casey has shouldered the burden of paying extra money for medical costs. Casey pays an insurance premium of \$1,494 per year. In this instance, where no authority requires the court to deviate from the Nebraska Child Support Guidelines to take into account Tarah's visitation costs and Casey is already shouldering the burden of substantial medical costs, we cannot find the trial court abused its discretion in failing to deviate from the Nebraska Child Support Guidelines.

V. CONCLUSION

We find that the trial court did not abuse its discretion (1) in failing to recuse Casey's counsel, (2) in failing to award Tarah custody of Sawyer and in its determination of the parties' respective parenting time, and (3) in failing to adjust Tarah's child support obligation based on the transportation costs associated with exercising her parenting time. Accordingly, we affirm the judgment of the trial court.

AFFIRMED.