

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-001751-ME

GARY LEE CORNS

APPELLANT

v. APPEAL FROM LEWIS CIRCUIT COURT
HONORABLE JEFFREY L. PRESTON, JUDGE
ACTION NO. 06-CI-00173

TAFFY LYNN CORNS (NOW RATCLIFF)

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: LAMBERT, THOMPSON, AND VANMETER, JUDGES.

LAMBERT, JUDGE: Gary Lee Corns appeals from the Lewis Circuit Court's order modifying an award of joint custody of his minor daughter to a grant of sole custody to his former wife, Taffy Lynn Corns (now Ratliff). After careful review, we affirm.

The parties were divorced by decree entered August 30, 2007, and were awarded joint custody of their minor daughter, Allison. Following the decree, numerous post-divorce disputes arose between the parties on a variety of issues, many directly related to problems regarding the parties' joint custody. Numerous motions have been filed and hearings held at the request of both parties to address situations that were impossible for the parties to resolve as joint custodians. The issues litigated involve both educational and medical disputes between the parties, including a specific court order permitting Taffy to have a tonsillectomy for Allison. Gary, however, has made numerous complaints to authorities throughout the history of this case, including complaints to the Cabinet for Health and Family Services, the Kentucky State Police, and the FBI.

This case culminated in a hearing on September 10, 2010, in which Gary was not represented by counsel. At the hearing, Gary asked for an extension of time to retain counsel, stating that he was unaware that the hearing was to address Taffy's motion to modify custody. Gary informed the trial court that he believed the hearing was strictly to address the proposed tonsillectomy for Allison. Taffy's counsel informed the trial court that it was joining Gary's motion to modify custody. The trial court denied Gary's request for a continuance and conducted the hearing. At the conclusion of testimony, the trial court entered an order dated September 14, 2010, that granted Taffy sole custody of Allison. Gary filed a motion to alter, amend, or vacate, which was subsequently denied.

Gary then appealed the trial court's order to this Court. In an opinion rendered on June 17, 2011, this Court reversed the trial court's order modifying custody and granting Taffy sole custody of Allison. This Court noted that because Gary had not filed an initial motion to modify joint custody, the trial court improperly and impermissibly allowed Taffy to "join" in Gary's motion to modify custody. Taffy's motion was not properly filed with an affidavit in support thereof, and Gary did not have notice that there would be a hearing regarding custody. This Court concluded that the trial court did not have subject matter jurisdiction to enter the order modifying joint custody, and remanded for further proceedings.

On June 30, 2011, Taffy filed a proper motion to modify custody. On July 7, 2011, the trial court properly set Taffy's motion for an evidentiary hearing and denied Gary's request to deny Taffy's motion for lack of adequate cause for a hearing. The evidentiary hearing was conducted on July 22, 2011. The trial court issued its order on August 11, 2011, granting Taffy's motion to modify custody and once again awarded Taffy sole custody of Allison. Gary filed a motion to alter, amend, or vacate, which the trial court again denied. This appeal now follows.

On appeal, Gary argues that the trial court abused its discretion and lacked substantial evidence under the requirements of Kentucky Revised Statutes (KRS) 403.340(3) and 403.270 to support a finding in favor of Taffy. Taffy argues that the award of sole custody to her was within the sound discretion of the trial court.

Generally, a family court has broad discretion in determining matters pertaining to custody of children. *Krug v. Krug*, 647 S.W.2d 790, 793 (Ky. 1983). However, upon appellate review, a family court's findings of fact will be set aside when found to be clearly erroneous. *Allen v. Devine*, 178 S.W.3d 517, 524 (Ky. App. 2005). A family court's findings of fact may be found clearly erroneous where unsupported by substantial evidence of probative value. *Black Motor Co. v. Greene*, 385 S.W.2d 954, 956 (Ky. 1964). Substantial evidence is defined as evidence that has sufficient probative value to induce conviction in the mind of a reasonable person when taken alone or in light of all the evidence. *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky. App. 2005).

KRS 403.340(3) provides that the court shall not modify a prior custody decree unless after a hearing it finds that a change in circumstances has occurred and that a modification is necessary to serve the best interests of the child. The statute lists the factors to be considered by the court in determining the best interests of the child. Gary argues that the trial court did not appropriately consider the factors in KRS 403.340(3) and 403.270(2) when it determined that joint custody of Allison was not in her best interests. Gary points to portions of the trial court's order where it made positive findings in regards to Gary as a parent and custodian. Certainly, the trial court did make positive findings regarding both Gary and Taffy as joint custodians of Allison, but ultimately the trial court concluded that the parties could not cooperate in any manner and could not make joint decisions regarding Allison. The trial court concluded that their inability to

make decisions made joint custody impossible and therefore that it “must make a determination of sole custody to one parent with visitation to the other.” The court found that while Gary clearly loves his daughter, his obsession with her “clouds his judgment and makes him not able to make good decisions and prevents him from being able to cooperate with [Taffy] and to make joint decisions.”

The trial court supported its determination that a modification to sole custody in favor of Taffy was in Allison’s best interest. While there was evidence that would have supported a determination that Gary was also an appropriate custodian for Allison, it is not this Court’s place to substitute its own judgment for that of the trial court. As the trial court’s findings were supported by substantial evidence, they were not clearly erroneous and we will not disturb them on appeal.

Gary also argues that Taffy failed to establish adequate cause to warrant an evidentiary hearing with regard to her motion to modify custody. Under KRS 403.350, a party who seeks to modify custody is required to submit an affidavit with her motion setting forth facts in support of the requested change. Where such facts are found lacking a court is required to deny the motion without a hearing. Adequate cause has been held to require “more than prima facie allegations which might permit inferences sufficient to establish grounds for a change of custody.” *West v. West*, 664 S.W.2d 948, 949 (Ky. App. 1984).

A review of the record indicates that Taffy’s affidavit in support of her motion to modify custody satisfied KRS 403.350 and set forth specific facts and allegations in support of the requested change. Taffy alleged that she and Gary

were unable to make joint decisions and that Gary had become so irrational in dealing with Allison that it endangered her physical, mental, moral, or emotional health. Taffy also alleged that Gary had made unsubstantiated complaints to authorities and had caused problems with Allison's doctors and teachers. We agree with the trial court that an evidentiary hearing was warranted in this case and Gary's claims to the contrary are without merit.

Finally, Gary argues that the trial judge erroneously failed to recuse himself from presiding over the hearing in this case. Gary argues that because a panel of this Court reversed a prior decision of the Lewis Family Court which had modified custody of the parties' minor child, the trial judge should have recused when the case came back to him on remand. Additionally, Gary argues that Taffy's employment with the Kentucky Cabinet for Families and Children also would have influenced the judge's decision and would render him partial.

KRS 26A.015(2) requires recusal when a judge has "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[.]" The burden of proof required for recusal of a trial judge is an onerous one. There must be a showing of facts "of a character calculated seriously to impair the judge's impartiality and sway his judgment." *Foster v.*

Commonwealth, 348 S.W.2d 759, 760 (Ky. 1961) (internal citation omitted).

A review of the record indicates that there has not been any bias, prejudice, or partiality in this case. In fact, the record indicates many varied

rulings in favor and against both parties. Further, Gary's argument that the judge favored Taffy because she works for the Cabinet is without merit. The record indicates that Taffy is a secretary for the Cabinet, and under Gary's theory, any family court judge would be excluded from hearing a case involving Taffy or her children. This simply defies logic. Absent a clear showing of prejudice or bias in this case, we cannot say that the trial judge erred when he failed to voluntarily recuse.

Discerning no reversible error, we affirm the August 11, 2011, order of the Lewis Circuit Court.

ALL CONCUR.

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