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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000963-ME

JONATHAN M. WARAWA APPELLANT

v.

APPEAL FROM SHELBY FAMILY COURT
HONORABLE S. MARIE HELLARD, JUDGE
ACTION NO. 12-CI-00658

MICHELYNN D. WARAWA APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: DIXON, KRAMER AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: Jonathan M. Warawa and Michelynn D. Warawa were married on May 12, 2007, and two children were born of the marriage. The present appeal arises from an order of the Shelby Family Court adopting the recommendations, rationale and findings and conclusions of a parenting coordinator. Jonathan alleges that the family court's denial of a hearing on various

motions he filed regarding the children's schooling, medical providers and motions to hold Michelynn in contempt for her alleged noncompliance with an order of the family court was an improper delegation of judicial authority and a denial of due process.

Following the entry of the decree of dissolution on October 17, 2013, the issue of child custody remained unresolved for almost four years. During that time, the parties were enmeshed in litigation regarding the care, custody and control of their children. Emergency protective orders were entered; dependency, neglect and abuse actions were filed; parenting schedules and plans were set forth; depositions were taken; psychological evaluations were performed; multiple custodial evaluations and updates were made; and there were multiple therapists and parenting coordinators involved. During that same time, Jonathan filed bar complaints against counsel and complaints against other professionals with their respective boards. In all, more than 200 pleadings and orders have been filed or entered.

On August 3, 2017, the parties appeared before the family court and announced they had reached an agreement that resolved all pending motions. At that time, they orally recited their agreement including joint custody of the minor children and that the children would continue to attend Whitefield Academy for the 2017-2018 school year. The parties also agreed that both parties would be

consulted prior to any meeting with the children's pediatrician and that neither would make remarks about the other to the children's pediatrician. The parties further agreed that Michelynn would make no allegations to third parties about Jonathan being a sex offender or an abuser. Those provisions were included in the family court's order entered on October 9, 2017. The parties also agreed they would continue to use a parenting coordinator who would have a limited role. In accordance with that agreement, the October 9, 2017 order states:

> IT IS FURTHER ORDERED that the parties shall have a Parenting Coordinator who shall have a limited role. Issues of custody and parenting time, other than minor issues such as vacation dates, special occasions, etc., shall be addressed by the Court, it being the desire of the parties to transition away from a Parenting Coordinator. The parties shall move away from the use of a Parenting Coordinator sooner rather than later on the condition that they remain civil in their communications and are able to make decisions on their own.

One month after the entry of the above order, Michelynn filed a motion to compel Jonathan to pay the parenting coordinator. Jonathan filed a response requesting a hearing on why a parenting coordinator was necessary and objected to issues being delegated to a parenting coordinator without the opportunity to be heard. Without conducting the requested hearing, on November 11, 2017, the family court ordered that the parties submit their outstanding issues to the parenting coordinator. Jonathan filed a motion to reconsider. The family

court denied the motion on November 30, 2017, stating that "the parties are in need of a parenting coordinator."

Subsequently, Jonathan filed motions to move the children from Whitefield Academy to a less expensive school, to change the children's dental provider and for contempt against Michelynn for failing to notify him of the children's medical appointments and Michelynn's discussions of sexual abuse allegations against Jonathan with third parties. He requested a hearing on those matters.

On December 14, 2017, the family court issued an order stating that "all issues, other than custody and parenting time must go before the parenting coordinator; Therefore, mtns re: insurance and school must be addressed w/parenting coordinator." Jonathan's motions, including his contempt motions against Michelynn, were sent to the parenting coordinator.

On February 27, 2018, the parenting coordinator submitted recommendations on Jonathan's motions. The parenting coordinator concluded that it was in the children's best interest to remain at their current school. He also found Jonathan's request that the dental provider be changed to one covered under his insurance was reasonable and recommended that the provider be changed. The parenting coordinator found Michelynn's failure to notify Jonathan prior to taking the children to the pediatrician on two separate occasions did not rise to the level of

contempt but warned if the pattern continued, a contempt recommendation may follow. Finally, the parenting coordinator found that the statements made by Michelynn to the children's therapist that she believed Jonathan had sexually abused the children were made prior to the entry of the October 9, 2017 order and, therefore, he did not recommend that she be held in contempt. However, the parenting coordinator stated that such behavior in the future could result in contempt.

Jonathan filed exceptions to the parenting coordinator's recommendations and requested a hearing. The family court denied Jonathan's request for a hearing on his objections to the recommendations reasoning that it was familiar with the parties and the case. The family court accepted the recommendations of the parenting coordinator and adopted those recommendations as an order of the court. This appeal followed.

Jonathan argues three points of error: (1) the family court erred by appointing a parenting coordinator without making judicial findings and delegating nearly all decisions to him; (2) the family court's refusal to conduct a hearing and reliance on the written recommendations of a parenting coordinator without a hearing denied him access to the court and due process; and (3) the family court delegated issues to the parenting coordinator in violation of its October 9, 2017 order.

By enactment of Kentucky Revised Statutes (KRS) 23A.100(1) in 2003, the General Assembly vested the family court as a division of the circuit court with the following jurisdiction:

(a) Dissolution of marriage;

(b) Child custody;

(c) Visitation;

(d) Maintenance and support;

(e) Equitable distribution of property in dissolution cases;

(f) Adoption; and

(g) Termination of parental rights.

With the family court's jurisdiction established, domestic relations commissioners in counties with family courts were abolished and "no commissioner shall be appointed to hear or determine any matter within the jurisdiction of the family court." KRS 23A.120. The abolition of domestic relations commissioners in those counties that have a family court was necessary to promote the "holistic approach to families (the one-family one-judge idea)" used by those courts. *Morgan v. Getter*, 441 S.W.3d 94, 105 (Ky. 2014).

To provide the "therapeutic justice" unique to the family courts, the family courts have their own rules. *Id*. With the abolition of domestic relations commissioners and given the distinct duties of the family courts, those courts have

been given authority to enlist the assistance of persons outside the judicial system. Rule 6(2) of the Family Court Rules of Procedure and Practice (FCRPP) provides:

> A parent or custodian may move for, or the court may order, one or more of the following, which may be apportioned at the expense of the parents or custodians:
>
> (a) A custody evaluation;
>
> (b) Psychological evaluation(s) of a parent or parents or custodians, or child(ren);
>
> (c) Family counseling;
>
> (d) Mediation;
>
> (e) Appointment of a guardian *ad litem;*
>
> (f) Appointment of a friend of the court or *de facto* friend of the court;
>
> (g) Appointment of such other professional(s) for opinions or advice which the court deems appropriate; or,
>
> (h) Such other action deemed appropriate by the court.

Although parenting coordinators are not expressly mentioned, the use of parenting coordinators and other third parties to assist the family court has now become common in high conflict cases when the family court deems the assistance of a counselor or attorney would aide in the resolution of conflicts.[1]

[1] For example, Jefferson Family Court Rule 705 provides specifically for a parenting coordinator and details the limits of the role of a coordinator.

We acknowledged the use of parenting coordinators in family court cases when the parties are unable to communicate or reach agreements regarding the day-to-day care and custody of their children in *Telek v. Bucher*, No. 2008-CA-002149-ME, 2010 WL 1253473 (Ky.App. Apr. 2, 2010) (unpublished).[2] However, we stressed that a parenting coordinator is not a final arbitrator and "[i]f either party should disagree with the parenting coordinator's determination, they may turn to the family court for a final decision." *Id*. at *5. Because the parties can turn to the family court for a final decision, we held that participation in *counseling* with a parenting coordinator is not an improper delegation of the family court's judicial function. *Id*. "Rather, in a high conflict case . . . the parenting coordinator merely assists the court by ensuring that the court's mandates are being carried out in a manner that serves the best interests of the child." *Id*.

While the role of the counselor in *Telek* did not infringe on the family court's judicial function, that was true because the parties could turn to the family court for a final decision. The difficulty presented with the family court's appointment of a parenting coordinator in this case is that while Jonathan filed objections to the parenting coordinator's recommendations, the family court did not conduct any type of hearing or, for that matter, consider the merits of the issues

[2] We cite this unpublished case pursuant to Kentucky Rules of Civil Procedure (CR) 76.28(4)(c).

raised. The question is whether the family court improperly delegated its judicial authority.

The notion that a court cannot delegate its judicial power is found in Section 109 of the Kentucky Constitution. It states:

> The judicial power of the Commonwealth shall be vested exclusively in one Court of Justice which shall be divided into a Supreme Court, a Court of Appeals, a trial court of general jurisdiction known as the Circuit Court and a trial court of limited jurisdiction known as the District Court. The court shall constitute a unified judicial system for operation and administration. The impeachment powers of the General Assembly shall remain inviolate.

That constitutional mandate is embodied in CR 52.01 and its requirement that "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment[.]" In *Bingham v. Bingham*, 628 S.W.2d 628, 630 (Ky. 1982), the Kentucky Supreme Court upheld delegating the clerical task of drafting proposed findings of fact and conclusions of law to an attorney but cautioned that to avoid the constitutional prohibition of delegating the trial judge's judicial power, the decision-making process must be under the control of the trial judge and the findings and conclusions must be "the product of the deliberations of the trial judge's mind."

Although the use of a parenting coordinator was not at issue, this Court's decision in *Maclean v. Middleton*, 419 S.W.3d 755 (Ky.App. 2014), including the well-written dissent in that case, is insightful. This Court addressed the use of a Master Commissioner in a Jefferson Family Court case and the delegation of judicial authority to decide the distribution of marital property. The majority addressed the dissent's view that the family court lacked the authority to appoint the Master Commissioner. While the majority agreed that there was no statutory or procedural authority for the process used, neither party raised the issue and both agreed to have the issues concerning marital property decided by the commissioner. *Id*. at 761.

The majority also addressed and disagreed with the dissent's conclusion that the family court improperly delegated its decision-making responsibility. In doing so, the majority emphasized "the record clearly shows that the trial court was thoroughly familiar with the proceedings and facts of the case and that it had prudently examined the proposed findings and conclusions[,]" pointing out the following facts:

> Although the Commissioner actually heard most of the evidence presented by the parties, a thorough record was made of those evidentiary hearings. The Commissioner's recommended findings were the subject of lengthy proceedings before the trial court. The trial court extensively discussed the issues raised by parties in their respective objections to the Commissioner's recommended findings. After thorough review, the trial

> court incorporated those findings into its judgment. Under the circumstances, we cannot find that the trial court abdicated its fact-finding and decision-making responsibilities to such a degree that its judgment must be set aside on this basis alone.

Id. at 760.

In this case, the family court referred the parties' disputes concerning the children's schooling, medical provider and contempt motions to a parenting coordinator. Also, further distinguishing this case from *Maclean* is that there was no hearing conducted by the parenting coordinator and his recommendations were based on interviews he conducted. There was no evidentiary hearing to review.

Although Michelynn argues the issues of schooling and medical care were not "custody" matters and, therefore, a hearing was not required, we disagree. Issues concerning educational decisions and medical decisions are matters of custody. *Keeton v. Keith*, 511 S.W.3d 918, 921 (Ky.App. 2017). "A significant and unique aspect of full joint custody is that both parents possess the rights, privileges, and responsibilities associated with parenting and are expected to consult and participate equally in the child's upbringing." *Pennington v. Marcum*, 266 S.W.3d 759, 764 (Ky. 2008). Where the parties "are unable to agree on a major issue concerning their child's upbringing, the trial court, with its continuing jurisdiction over custody matters, must conduct a hearing to evaluate the circumstances and resolve the issue **according to the child's best interest**."

Burchell v. Burchell, 684 S.W.2d 296, 300 (Ky.App. 1984) (emphasis added). We agree with the Court's concise statement in *Silbowitz v. Silbowitz*, 88 A.D.3d 687, 687–88, 930 N.Y.S.2d 270, 271 (2011) (citations omitted): "Although a court may properly appoint a parenting coordinator to mediate between parties and oversee the implementation of their court-ordered parenting

plan[,] a court may not delegate to a parenting coordinator the authority to resolve issues affecting the best interests of the children."

The problem here is not that a parenting coordinator was used. In fact, the parties agreed that a parenting coordinator would be used. However, that agreement did not permit the parenting coordinator to be a final decision-maker without the family court conducting an independent review if requested by one of the parties. That is the overriding problem. The family court delegated its final decision-making authority to the parenting coordinator. While no doubt the family court was familiar with the parties and the case, as it should have been given the one-family one-judge approach of our family courts, that familiarity does not relieve the family court of making judicial decisions on an issue-by-issue basis.

The parties have been consistently litigious and a parenting coordinator may be helpful in ensuring the court's orders are carried out. Perhaps, a parenting coordinator will avoid the parties' repeated court appearances by amicably resolving their disputes concerning the care of the children. However,

when those disputes cannot be resolved, a parenting coordinator cannot carry out the duties statutorily within the exclusive decision-making authority of the family court.

Jonathan's arguments that he was denied due process and access to the courts by the family court's adoption of the parenting coordinator's recommendations without conducting a hearing are subsumed within our holding that the family court improperly delegated its judicial power. Necessarily, there can be no meaningful opportunity to be heard by a court when that court's decision-making authority has been improperly delegated. While Jonathan may not have a strong factual basis for his motions, he is nevertheless entitled to a hearing. Should the family court determine his motions are frivolous, it retains the power to award attorney fees to Michelynn, if requested.

For the reasons stated, the order of the Shelby Family Court is reversed, and the case remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Patrick F. Graney Shelbyville, Kentucky	Megan P. Keane Louis I. Waterman Prospect, Kentucky