

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. 2008-CA-000858-ME

DAVID REIMER RYAN

APPELLANT

VS. APPEAL FROM OLDHAM CIRCUIT COURT
ACTION NO. 97-CI-00375

SUSAN MARIE RYAN, NOW BISIG

APPELLEE

BRIEF FOR APPELLANT, DAVID REIMER RYAN

Respectfully submitted:

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that true copies of this brief were served upon the following named individuals by first class mail, postage prepaid, on the ____ day of July, 2008: Hon. Timothy E. Feeley, Judge, Oldham Circuit Court, Oldham County Courthouse, 100 W. Main St., La Grange, KY, 40031; Sandra G. Ragland, Esq., 623 West Main St., Louisville, KY 40202. The undersigned does also certify that the record on appeal has been returned to the Oldham Circuit Court Clerk on or before this date.

EDWIN F. KAGIN

INTRODUCTION

This is a domestic relations case wherein appellant and appellee have joint custody of Michael. Appellant appeals the final judgment of the lower court in which appellant's constitutional right not to be required to send his child to a religious school was circumvented by the trial judge giving appellee sole custody of Michael on the single issue of which school Michael should attend.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant desires oral argument and believes that oral argument would be helpful to the Court. This appears to be a case of first impression in Kentucky on, *inter alia*, interpretation of Section 5 of the Kentucky Constitution as it related to appellant's right not to be required to send his child to a Roman Catholic religious school to which he is conscientiously opposed. This right, and the manner in which appellant alleges this right to have been abridged by the trial judge in consequence of erroneous evidentiary findings and legal rulings, can be best developed and understood in oral argument.

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STATEMENT OF THE CASE

Citations herein are to the Transcript of Record (hereinafter "T.R.") prepared by the Oldham Circuit Court Clerk, and to the Video Record (hereinafter "V.R.") made at the hearing on this matter.

Appellant (hereinafter "David") and Appellee (hereinafter "Susan") are divorced. They have one child between them, Michael, age 14. David and Susan have joint custody of Michael and share essentially equal parenting time. Susan is remarried; David is not.

Michael is fortunate indeed to have such parents. Both David and Susan are competent and caring, and, although not able to live together, neither alleges anything terribly negative about the other. David is a pilot for Delta Airlines. Susan is a pilot for United Parcel Service (UPS). They are both well adjusted and well paid individuals. They care for their son Michael, are quite capable of rearing him, and want the best for him. The parents have heretofore entered into a separation agreement, approved by the trial court. The case law of Kentucky, stated in *Burchell v Burchell*, 684 SW 296 (Ky. 1984), provides that in the event of a disagreement between them on a major decision affecting their son, the issue is to be submitted to the court for resolution. They are able to agree on all aspects of their joint custody and shared parenting arrangement save one.

Susan is a recent convert to Roman Catholicism, and David is a nonbeliever.

Susan wants to send Michael to St. Xavier Roman Catholic religious school.

David wants to send Michael to a secular school.

In its Order, entered in this action on August 10, 2005, the trial court stated, after denying David's argument that Michael should be sent to a secular school, that:

At the termination of eighth grade, a decision must be made as to whether Michael is to continue in parochial education by attending one of the Louisville Metro area's fine parochial high schools, or to switch to the public school system and attend one of the Oldham County High Schools, which are every bit as good and in many ways superior to the parochial schools. (T.R. 129)

David has stated, in support of his motion, made in the lower court, asking the court to order that Michael be sent to a secular school:

I am **conscientiously opposed** to sending my son Michael to a sectarian school of any nature. **I am an Atheist.** I do not believe in any god or gods nor in the existence of a supernatural world, Upon information and belief, any parochial school controlled by the Roman Catholic church will teach, and attempt to indoctrinate my son into, a belief system which I reject and which I respectfully do not wish my son to be coerced, under Court Order, to endure.. I respectfully demand that this Honorable Court order that Michael be sent to a secular High School rather than to a sectarian High School.

Affidavit of David Ryan. (T.R. 286-288)

David has testified under oath that he is conscientiously opposed to sending Michael to a religious school (V.R. 4/02/08; 1:44:29 PM.). Susan has testified that while she prefers sending Michael to a religious school, she has no serious objection to Michael attending a secular school. Susan has not stated that she is conscientiously opposed to sending Michael to a secular school. Indeed, her objection to Michael attending the fine secular school under consideration was "because it is not where he wants to go" (V.R. 4/02/08; 2:43:14). Indeed, her stepchildren are presently attending a secular school under court order. (V.R. 4/02/08; 2:45:00 PM).

A one day trial on this issue was held in the Oldham Circuit Court. David called one expert witness, Edward Buckner, Ph.D. from Georgia. Susan called no experts. Dr. Buckner's testimony, which was neither challenged nor refuted, was that a secular school was more in Michael's best interests than a religious school, despite Michael's stated

preference for the religious school. Indeed, Dr. Buckner testified that, in his opinion as an expert, a religious school was harmful to children (V.R. 4/02/08; 10:31:20, 10:40:30).

The therapist appointed by the court testified that it would be better for Michael if the judge decided what school he is to attend, rather than leaving him torn between his parents' opposing opinions (V.R. 4/02/08; 12:28:38 PM).

Several days after the conclusion of the hearing, the judge, who had denied a motion that he recuse himself, issued an unusual ruling. After denying Susan's motion for a change of custody (V.R. 4/02/08 3:18:45), the court ruled (T.R. 309-316) that joint custody was to continue, but that Susan was to have sole custody of Michael for the purpose of determining which school he should attend (T.R.316).

This ruling permitted the court to dodge its duty to make a ruling when the joint custodians could not agree on an issue , as well as the prohibition of Section 5 of the Kentucky Constitution that mandates that David not be required to send his child to a school to which he is conscientiously opposed, by permitting Susan to make the decision on which school Michael is to attend, knowing full well that she will elect to send him to the religious school as she testified (VR 4/02/08 2:36:55). Indeed, Michael is currently enrolled at St. Xavier High School and, absent a reversal by this Court, will start attending in the middle of August. Michael has also been accepted into Kentucky Country Day, the finest secular school in the area (V.R. 4/02/08; 1:43:40).

David had argued that the court should have erred, if it erred at all, on the side of the Constitution and not on the side of the Catholic Church. The court erred on the side of the Catholic Church.

This appeal followed.

ARGUMENT

- I. WHETHER THE COURT ERRED BY FAILING TO RECUSE HIMSELF BASED ON THE APPEARANCE OF BIAS ATTENDANT UPON THE COURT BEING A MEMBER OF THE CHURCH THAT SPONSORS THE SCHOOL WHICH THE CHILD OF THE PARTIES HAS BEEN PREVIOUSLY ORDERED BY THE COURT TO ATTEND.

This issue is preserved for appellant review at T.R. 309-316 and T.R. 317.

Nothing is more basic to our jurisprudence than the principle that judges be impartial. Thus the canons of judicial ethics state:

- (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned.

Kentucky Code of Judicial Conduct, Canon SCR 4.300 (3) (E).

David formally moved that the court recuse himself because of at least the appearance of possible bias. (T.R. 283-284). The court declined to do so. The judge is a member of St. Aloysius Church, the church that operates the religious school to which Michael was previously being sent under the order of the Court. The judge admitted this fact, but denied that any prejudice would result from that affiliation, and denied the motion to recuse (T.R. 292).

This Honorable Court is requested to take judicial notice of the fact that judges in Kentucky are elected and that local citizens who attend local churches vote, and influence others to vote, in elections. To ask of a sitting jurist, who is subject to reelection, that he ignore this reality and nevertheless rule impartially in an issue finely drawn, and widely publicized in his community, between the interests of an atheist and the interests of his

own church, is to ask of that judge more than should be asked of anyone in public life. A judge who has previously run successfully for judicial office should be held to fully understand that how he ruled in this case—for the atheist or for his own church—would, at a minimum, be noticed by voters who will decide if he is to be their elected judge for another term. The trial judge was not forced to withstand this ethical dilemma. Indeed, he was given the opportunity to avoid the conflict by Appellant’s timely, as well taken, request that he recuse himself. Doing so would have appeared most appropriate to anyone and would have drawn no complaint as, herein argued as error, does the failure of the judge do so.

The rule prohibiting even the “appearance” of impropriety protects the judge as well as the parties. Certain beliefs and predilections are so much a part of a given person that the person may be unaware of the power they have in influencing his decision making and judgment. If the person in question is a judge, then safeguards should be in place to prevent unconscious bias from affecting rulings that the law says must be impartial. This is accomplished by the Code of Judicial Conduct that protects the impartiality of the proceedings and also protects the judge from unconsciously falling into error, as David feels occurred in his case in the matter of the testimony of Dr. Edward Buckner.

This Honorable Court is asked to hypothesize what might happen if the trial judge, in a case similar to that *sub judice*, was a practicing Muslim and was being asked to choose between a fine Muslim school and a fine secular school on the motion of an atheist father who asks that he not be required to send his son to a Muslim school because he is conscientiously opposed to Muslim schools. Would not an appearance of

impropriety be wisely avoided by the judge simply letting a judge who was not a Muslim rule on the law and the facts? Imagine the outcry of the popular press in reporting that a Muslim judge had ruled in favor of a Muslim school and against a secular school. In the interest of substantial justice, in fulfillment of the spirit of the Judicial Canons, and in an effort to avoid even of the appearance of impropriety, the trial judge should have recused himself from hearing this matter. Error was committed by his failure to do so.

II. WHETHER THE COURT ERRED IN REJECTING THE TESTIMONY OF APPELLANT’S EXPERT, DR. EDWARD BUCKNER, AN ATHEIST, WHICH THE COURT FOUND BIASED BECAUSE OF DR. BUCKNER’S EXPERT OPINION THAT RELIGIOUS EDUCATION IS HARMFUL TO CHILDREN.

This issue is preserved for appellant review at T.R. 312 and T.R. 317.

The Kentucky Code of Judicial Conduct further provides:

A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon . . . **religion** . . .” (emphasis added)

Kentucky Code of Judicial Conduct, SCR 4.300 Canon 3(B)(5)

The totality of the trial of this matter, while displaying an apparently sincere attempt by the trial judge to be free of bias, clearly reflects a bias in favor of religious instruction and against the atheism of David. This is most apparent in the judge’s treatment, and summary dismissal, of the opinions of appellant’s expert witness in education, Dr. Edward Buckner. (VR 4/02/08; 11:20:55 AM)

The decision as to whether a witness is qualified to give expert testimony rests initially in the sound discretion of the trial court. *Kentucky Power Co. v. Kilbourn, Ky.*,

307 S.W.2d 9 (1957); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

...the trial judge must determine at the outset of trial, pursuant to KRE 104, 'whether the expert is proposing to testify to (1) scientific [, technical, or other specialized] knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.' *Daubert*, 509 U.S. at 592. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575 (Ky. 2000), at 578.

Furthermore, our Supreme Court in *Goodyear Tire* noted, "abuse of discretion is the proper standard of review of a trial court's evidentiary rulings. . . . A trial court's ruling on the admission of expert testimony is reviewed under the same standard as a trial court's ruling on any other evidentiary matter." *Id.* at 577-78. *Goodyear Tire* goes on to define the test for abuse of discretion as "whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.* at 581.

The *Kentucky Rules of Evidence* (hereinafter KRE) have further clarified the ability of an expert to render opinion testimony in a court proceeding on the ultimate issue of a case at bar.

In *Stringer v. Commonwealth*, 956 S.W.2d 883, (1997), the Kentucky Supreme Court adopted the principle of KRE 704, thereby effectively abrogating the "ultimate issue" prohibition that had previously prevailed under the common law of Kentucky.

Under *Stringer*, expert opinion evidence is admissible so long as (1) the witness is qualified to render an opinion on the subject matter, (2) the subject matter satisfies *Daubert*, (3) the subject matter satisfies the test of relevancy set forth in KRE 401, subject to the balancing of probativeness against prejudice required by KRE 403, and (4) the opinion will assist the trier of fact per KRE 702, on "Testimony by experts," which states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

KRE 702

See also: (<http://www.lawreader.com/index.php/browse/node/4448.html#SEALBELT2>).

David argues that the trial court abused its discretion by an *ad hominem* dismissal of Dr. Buckner's expert testimony after Dr. Buckner, an atheist, was properly permitted to testify as to what is really the ultimate issue in this case, i.e, to which school Michael should be sent. The witness testified strongly in favor of the secular alternative. No expert testimony challenging this opinion was introduced. It is respectfully suggested that this conclusion was disregarded by the Roman Catholic judge because the witness was an atheist and, under the teachings of that church, a "sinner." (VR 4/02/08 10:39:30 AM; 10:38:44 AM; 10:37:30 AM).

This Court is asked to imagine the outcry that would occur if an expert witness in a trial, who was known to be a Roman Catholic, should testify that religious education in Catholic Schools is good for children, and to have that expert opinion completely disregarded by the trial court because the judge found the expert's opinion to be biased in that the expert was a Roman Catholic. This was exactly the situation in the trial of this action, except that the expert witness was an atheist and the judge could not accept his evidence. While not directly so stated, the action by the trial judge strongly suggests this interpretation. To summarily dismiss, as biased, the testimony, and the well reasoned research based opinions, of an expert witness, who is an atheist, is to deny the person calling that witness, as well as the witness, due process of law and equal protection of the

laws guaranteed by the Fourteenth Amendment to the Constitution of the United States, an argument that will be further developed *infra*.

No objection was made to Dr. Buckner's testimony by either the attorney for Susan or by the Court. Dr. Buckner, a Ph.D. in Education, testified, *inter alia*, that in his opinion a religious education is harmful for children (V.R. 4/02/08; 03:18:45 PM). To be sure, this is a dramatic statement to make in a society as predisposed as ours to think well of things religious. Yet Dr. Buckner presented evidence to support his opinion, as he did for other elements of his testimony, and for his ultimate conclusion, received without objection, that Michael's best interests would be served by the court ordering him sent to the fine private secular school that had accepted him for admission for the Fall Term of 2008 (V.R. 4/02/08; 10:44:54 AM).

In the order appealed from, the judge states:

Mr. Buckner testified that KCD is the superior high school for Michael because it is co-educational; has a high academic rating; and is secular, rather than religious based. Dr. Buckner's bias was evident to the Court, as he testified that he was in agreement with the philosophy that indoctrination of children to a religious belief constitutes a form of child abuse (T.R. 312)

With all due respect to the office of the court, the trial judge was not competent to form this conclusion. It is submitted to this Court that indeed there was bias revealed in this hearing. But the bias came from the trial judge, not from the expert witness. Dr. Buckner had rational reasons and evidence underlying his opinions.

III. WHETHER THE COURT ERRED IN GIVING APPELLEE SOLE CUSTODY OF THE CHILD OF THE PARTIES FOR THE LIMITED PURPOSE OF DETERMINING WHAT SCHOOL HE SHOULD ATTEND, KNOWING THAT APPELLEE WOULD SEND THE CHILD TO A RELIGIOUS SCHOOL CONTRARY TO THE CONSCIENTIOUSLY MADE OBJECTION OF APPELLANT, AND DESPITE SECTION 5 OF THE KENTUCKY CONSTITUTION AND STATUTORY MANDATES PROHIBITING THIS RESULT.

This issue is preserved for appellant review at T.R. 286-288 and T.R. 309-316 and T.R. 317.

The Constitution of Kentucky states, in relevant part:

“...nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed; and the civil rights, privileges or capacities of no person shall be taken away, or in anywise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma or teaching” (emphasis supplied).

Constitution of Kentucky, Section 5

David’s assertion of his conscientious objection to his child being sent to a religious school was made clear throughout this proceeding, in both the motion under consideration and in the trial itself (T.R. 282-288) (V.R. 4/02/08; 1:44:30 PM). David will concede that in modern understanding of constitutional provisions, and in the interest of political correctness, that the term “man,” should be understood today as “person,” and not in the literal sense that was undoubtedly meant at the time of the adoption of the Kentucky Constitution, a time when women were denied the right to vote and other aspects of full citizenship, and when people rode around on horses.

However, there is little precedent to guide this Court, or for David to argue, on this precise issue, and the question herein presented appears to be one of first impression.

The only major interpretation of Section 5 of our Constitution is found in *Kentucky State Board for Elementary and Secondary Education V Rudasill*, 589 S.W. 2nd 877 (Ky. 1979). In this case, it was held that, under Section 5, Kentucky parents could not, for reasons of religion and conscience, be forced send their child to a public school.

A similar result prevailed in the Eighth Circuit case *Windsor Park Baptist Church, Inc. v. Arkansas Activities Association* 658 F.2d 618 (1981), wherein Amish parents challenged mandatory public school education for their children. Both cases came down solidly on the rights of parents to deny their children a public school education on religious grounds.

The Kentucky Statute is remarkably clear on just what is required for a court to grant a change of custody. The relevant law states:

KRS 403.340 MODIFICATION OF CUSTODY DECREE.

- (1) As used in this section, "custody" means sole or joint custody, whether ordered by a court or agreed to by the parties.
- (2) No motion to modify a custody decree shall be made earlier than two (2) years after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe that:
 - (a) The child's present environment may endanger seriously his physical, mental, moral, or emotional health; or
 - (b) The custodian appointed under the prior decree has placed the child with a de facto custodian.

The law applies with as much force to joint custody situations as it does to an attempt to change custody away from a sole custodian. Susan had in fact made a motion to change custody (T.R. 301-305), and David had objected based on the insufficiency of the affidavit and on an allegation of bad faith (T.R. 306-308).

At the conclusion of the hearing, the trial judge overruled the motion for change of custody (V.R. 4/02/08; 3:18:45 PM). Under KRS 403.340 (2), the judge could not reconsider the matter for another two (2) years. Nowhere does one find a provision that permits the judge to both continue joint custody, as the court did (T.R. 316) (V.R. 4/02/08; 3:18:45 PM) and to give “sole custody” on one issue only.

The trial court quite properly found that it is in the best interests of Michael that joint custody continue. *Mennemeyer v. Mennemeyer*, 887 S.W.2d 555, 558 (Ky. 1994); *Stinnett v. Stinnett*, Ky. App., 915 S.W.2d 323, 324 (Ky. 1996); *Jacobs v. Edelstein*, 959 S.W.2d 781 (Ky. 1998). This trilogy of cases reflects the evolving Kentucky law that appears to have established that the court may intervene in joint custody situation with remedies less draconian than changing the custodian. Indeed, KRS 403.330 permits the court to supervise the implementation of the agreement between David and Susan.

Kentucky case law requires, in a situation such as this, when the joint custodians are unable to agree upon a major issue affected the child, that the court conduct a hearing and decide the issue for the parties. *Burchell v Burchell*, 684 SW 296 (Ky. 1984). The trial court had acknowledged his duty under *Burchell* (T.R. 167-168) when David had previously strongly objected to his son being sent to a religious school (T.R. 115-129).

It is herein argued in this appeal urging reversal, that had the trial judge not been biased, as it is herein alleged he was, he would not have ruled as he did. He would have made the decision regarding Michael’s education for the parties and, in so doing, he would have heeded the mandates of Section 5 of the Kentucky Constitution, which prohibited him from sending Michael to a school to which David is conscientiously opposed, and he would have ordered Michael be sent to a secular school, in conformity

with the un-refuted testimony of the only expert on education to testify in the hearing, that such was in the best interests of the child.

All parties agree that Michael has stated a preference for attending the Catholic School to which Susan would send him. This is hardly surprising considering that he has for the past few years been attending St. Aloysius School, under order of the judge who is a member of St. Aloysius Church. The judge opined that such things as football and friends were legitimate criteria for permitting Michael's preference to prevail (V.R. 4.02.08; 12:18:40 PM). No educator would make such a weighty decision based on such criteria alone. And, as the expert who testified for David's position observed, this is why children do not get the last word in either education or whether they should have a motorcycle (V.R. 4/02/08; 10:47:48).

While Michael's wishes in the matter of his schooling are certainly to be considered, such is far from conclusive on the issue of what is in Michael's best interest, as explained by education expert Dr. Buckner (V.R. 4/02/08; 10:32:20 AM; 10:47:20 AM). If a child were permitted to decide just what is in his or her best interest for all issues, the presence of a trier of fact and experts would be superfluous. The therapist appointed by the court testified that Michael has stated to her that he wished to attend the Catholic religious school. However, this witness was not an expert in education, nor was she able to say that the wishes of the child were in the child's best interests (V.R. 4/02/08; 12:08:56 PM).

Under prevailing case law, the court could arguably have determined that joint custody was no longer possible and granted sole custody to one of the parties. Had this occurred, Susan could have been awarded sole custody of Michael and she could have

determined his place of schooling, together with having the right to make all other decisions permitted by a grant of sole custody. However, the court did not give Susan sole custody, nor could the court have so done given that the threshold requirements to change custody under KRS 403.340 had not been met. There was no suggestion that the joint custody arrangement agreed to by the parties and approved by the court in any way might seriously endanger Michael's "physical, mental, moral, or emotional health," nor has Michael been placed "with a de facto custodian." The court found that continuation of joint custody was in Michael's best interest, a holding that David does not dispute.

The court had a problem. Because of the bias hereinabove alleged and discussed, David believes, and the record supports, the inference that the court wanted Michael to attend a religious school. However, to achieve this end, the court could not fulfill its statutory duty and decide the issue *de novo* on the standards of the best interests of the child, because the evidence of best interest was heavily on the side of Appellant, including as it did, the un-refuted expert testimony of Dr. Buckner. This, combined with the clear language of Section 5 of the Kentucky Constitution, which prohibited the judge from sending Michael to a school to which Appellant was constitutionally opposed, prevented an order from the court that Michael be sent to the school operated by the Catholic Church, the religious body with which the Judge is affiliated.

It is respectfully suggested that the court therefore devised a hybrid compromise to achieve the end sought, a solution less obviously violative of constitution and law. The court ruled that Appellee was to have sole custody for the purpose of determining Michael's education. The court said:

The clear best interest of this child is supported by the mother's position. Therefore, this Court amends its previous findings of joint custody of Michael. Michael's mother, Susan Bisig, is granted sole custody of Michael as it relates to educational decision making (T.R. 316)

It is respectfully argued that the law does not permit this result. There must be a grant of either joint custody or of sole custody. There is no known precedent for a grant of sole custody for one issue only. Could David hereafter be awarded sole custody for the purpose of deciding what Michael is to have for breakfast on alternate Tuesdays? The very idea dissolves under the *reductio ad absurdum* principle of defeating logical fallacy, whereby a concept is refuted by showing that, if carried out fully, it would lead to absurd results. The law has wisely avoided such absurdities.

Further, to award one parent sole custody on the single issue of deciding the school the child will attend is to ignore the realities of life. The choice of school involves much more than a decision as to in what building the child sits in class and where he receives instruction. The parent who makes that decision has also decided what the child will most likely do when not at school, what activities he will become involved with, the religious views of the persons he is most likely to become friends with, eventually date, and possibly marry, the church (if any) he will experience pressure from his peers to join, and the orientation he will receive toward understanding his life and his place in the universe. Michael will be subjected to, and enmeshed in by deliberate design, the entire *Consensus Gentium* of the religious life style his atheist father wants him to eschew. This mandatory belief system, to which Michael will be exposed by court order, is programmed to teach him that his loving atheist father should be denounced as "a sinner." (V.R. 4/02/08; 10:37:30, 10:39:20 AM). (V.R. 4/02/08; 10:37:30, 10:39:20

AM). David wants none of this. He is “conscientiously opposed” to being compelled to send his child to a religious school. He has quite enough problems to address between himself and his son. Their relationship does not need a gratuitous, bigoted, and judgmental pronouncement from religious authorities that the loving father of Michael should be shunned by Michael as a sinner under their rules.

And if it be argued that by ordering that Susan select, and pay for, the school that Michael will attend, the court is not causing David to be unconstitutionally “...compelled to send his child to any school to which he may be conscientiously opposed,” in violation of Section 5 of the Constitution of Kentucky, such attempts at avoidance of the mandate must be rejected.

If David does not have the right to send his son to a superior secular school, devoid of the religious indoctrination and a catechism which condemns atheists—an education he rejects for his son—then he is being “compelled” by the force of the power of the state, that stands ready to enforce the order of the court, to refrain from undertaking corrective measures to prevent that to which he is “conscientiously opposed.” David cannot defy the orders of the court without being subjected to civil, and possibly criminal, sanctions for asserting his rights of conscience. To prevent a person from doing what he has a right to do is the same as compelling him to do what he does not wish to do. The guarantee of Section 5 does not say it is grounded on who pays the fees. If David has joint custody, which he does, then he has the right to the protections of Section 5 of our state’s constitution.

The lower court has opined in this case that the “best interests of the child” test takes preference over any constitutional rights that David may have that relate to this issue (T.R. 168). Such an opinion is plainly error. All laws and juridical holdings of every State in the union are subject to the authority of the Constitution of the United States.

Article VI of that constitution states, in mandatory language:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and **the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.** (Emphasis supplied)

Article VI of the Constitution of the United States

The First Amendment to the U. S. Constitution states,

Congress shall make no law respecting an establishment of religion.... “

The Fourteenth Amendment makes this provision applicable to the states and guarantees all American citizens “equal protection” of the laws and “due process of law:”

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fourteenth Amendment, Section 1,
Constitution of the United States

The Constitution of Kentucky, under the heading “Right of religious freedom,” provides what is actually an enlargement of rights, going beyond even those given more generally by the First Amendment. The Kentucky statement is one of, if not the, strongest statement of any state on religious freedom.

No preference shall ever be given by law to any religious sect, society or denomination; nor to any particular creed, mode of worship or system of ecclesiastical polity; nor shall any person be compelled to attend any place of worship, to contribute to the erection or maintenance of any such place, or to the salary or support of any minister of religion; **nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed**; and the civil rights, privileges or capacities of no person shall be taken away, or in anywise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma or teaching. No human authority shall, in any case whatever, control or interfere with the rights of conscience. (emphasis supplied).

Kentucky Constitution, Section 5

Susan testified that it was in Michael's best interest to attend a school that gives a good education (V.R. 04/02/08; 2:57:20 PM). She thereby tacitly agreed with Dr. Buckner's opinion and also tacitly disavowed any conscientious objection to a secular school.

In a series of leading questions to Susan, following her testimony in which there was no hint of any objection to a secular school, beyond the desire of Michael to attend the same school as some of his friends, the trial judge inquired into David's sincerity in saying he "conscientiously opposed" a religious school, whether David was really an atheist, and whether she thought she had a right to send her child to a school of her choice. (V.R. 04/02/08; 03:01:00 PM). This implication by the judge that David might be lying under oath, and the attempt to put into the record a conscientious objection on the part of Susan to a secular school when there was none, seems out of place in the proceeding. It is respectfully suggested that this exchange again shows the bias of the court that characterized the hearing.

There is no requirement in Section 5 of our Constitution that the rights asserted by David can only be asserted if the judge is convinced that David really is an atheist.

It is a requirement of Section 5 that the judge not send Michael to a school to which David is conscientiously opposed.

And our Kentucky Constitution requires that all judges of this Commonwealth honor this guarantee in our Bill of Rights, no matter what other laws, that may appear to transgress that guarantee, may be thought to apply.

The ruling of the trial judge herein is void, and its operation must be reversed by this Honorable Court. For our Constitution states:

To guard against transgression of the high powers which we have delegated, We Declare that every thing in this Bill of Rights is excepted out of the general powers of government, and shall forever remain inviolate; and all laws contrary thereto, or contrary to this Constitution, shall be void.

Kentucky Constitution, Section 26

David asks that his son not be indoctrinated against him.

If the court is to err, let it err on the side of the Constitution, not on the side of religion.

For our own safety's sake.

CONCLUSION

For all of the reasons herein presented, this case should be reversed and remanded and an order entered directing the trial judge to order that the child of the parties be sent to a secular school.

Respectfully submitted:

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