IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

FILED

January 18, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

JULIA WILSON NIELSEN (Now Sexton)	)	KNOX COUNTY
	)	03A01-9506-CV-00186
Plaintiff-Appellant	)	
v.	)	HON. BILL SWANN, JUDGE
JAN PETER NIELSEN	)	
Defendant-Appellee	)	VACATED AND REMANDED

ROBERT R. SIMPSON and SARAH SWANSON HIGGINS OF KNOXVILLE FOR APPELLANT

JOHN T. O'CONNOR OF KNOXVILLE FOR APPELLEE

OPINION

Goddard, P.J.

The Appellant, Julia Wilson Nielsen (now Sexton) appeals a judgment of the Knox County Circuit Court amending a custodial agreement so as to award sole custody of her son to her former husband, Jan Peter Nielsen, the Appellee. Specifically, the Appellant asserts that the Trial Judge erred by failing to grant her motion for continuance by excluding both parties from

the courtroom during the testimony of the Court's expert, by enjoining both parties from reading the expert's report, and by failing to recuse himself due to his relationship with the professional group of the expert appointed by the Court.

The parties were divorced on June 20, 1989, and agreed to exercise joint custody over their two minor children. The children were to spend nine days with the Appellant and five days with the Appellee. This agreement quickly proved unsatisfactory and both parties petitioned to modify the custodial agreement. The Appellee thereafter agreed to grant sole custody to the Appellant, but later filed a petition for sole custody himself and a motion for a psychological evaluation.

On October 2, 1992, the Trial Judge issued an order for a psychological evaluation and referred the parties to "Drs. Robert Wahler and/or Vey Nordquist and/or Edwin Rogers" with Dr. Nordquist ultimately performing the evaluation. The order also provided that the report resulting from the psychological evaluation would "be held in such confidentiality by the counsel as the expert may recommend for the welfare of the children and the parties." The custody issues were to be tried on November 9, 1992.

The report was made available to counsel at mid-day on November 7, 1992. On the morning of November 9, 1992, counsel for the Appellant moved the Court for a continuance. The

Appellant argues that because the report was delivered late her counsel were unable to develop countervailing evidence, that they had no time to depose Dr. Nordquist, or to consult another psychologist regarding Dr. Nordquist's methods of testing.

Counsel for the Appellant also assert that these problems were compounded because they were unable to have the benefit of the Appellant's input. The request was denied after argument of counsel and testimony of Dr. Nordquist. The Trial Judge found that the two-day delay was insignificant in view of the fact there would have been only four days to review the report had it been submitted on time. Further, the Trial Judge gave the Appellant the right to reopen the cross-examination of Dr. Nordquist after she retained an expert.

Also, based on the recommendation of Dr. Nordquist, the Trial Judge excluded both the Appellant and the Appellee from the courtroom during the testimony of Dr. Nordquist and later during the testimony of Dr. Diana McCoy, the Appellant's psychological expert. In explaining to the parties why they were excluded during this testimony, the Trial Judge stated that the decision was a weighing process which balanced the best interests of the children against the procedural rights of the parents.

At the close of the arguments, the Trial Judge found, almost exactly following the recommendation of Dr. Nordquist, that the custody of the minor daughter should be awarded to the

Appellant and that sole custody of the minor son should be awarded to the Appellee.

After filing a motion for a new trial, the Appellant discovered that the Trial Judge was on the advisory board of Children's Psychological Services of Knoxville, Inc., a corporation partially owned by Dr. Wahler.[1] Dr. Wahler had been referred to the parties as one of the Court's experts. He was also in a professional partnership with Dr. Nordquist. Further, in his final order the Trial Judge required the parties and their youngest child to engage in continued counseling with Dr. Wahler. Thereafter, the Appellant filed an amended motion for new trial and requested that the Trial Judge recuse himself. Both motions were denied. The Trial Judge stated that he had no knowledge that he was on the advisory board of the organization and that he thought that the organization was no longer in existence.

The Appellant raises three issues on appeal:

> I. Did the trial court err by denying the Appellant's motion for continuance, necessitated by the late filing of the custody evaluation report?
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> II. Did the trial court commit reversible error by excluding the parties from the courtroom during the testimony of the Court's own expert witness, psychologist Dr. Nordquist, and during the testimony of the mother's expert, psychologist Dr. McCoy, and further, enjoining the parties from reading Dr. Nordquist's written report?

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[1] The cover page of Speaking of Children, a publication of Children's Psychological Services of Knoxville, Inc., confirmed that Dr. Wahler was associated with the organization and listed the Trial Judge as a member of the organization's advisory board.

III. Did the trial court err in refusing to recuse and to vacate it's judgment upon the amended motion for new trial based on the judge's relationship with the professional group of the court's expert witness?

Because we find that the Trial Court committed error by excluding the parties from the courtroom, we do not reach the first issue, nor the merits of the third issue.

It is the rule in Tennessee that a party litigant has the right to be present at all stages of the proceeding. Warren v. Warren, 731 S.W.2d 908 (Tenn.App.1985). In Warren, a husband appealed from a divorce decree after the trial court denied his request that a court reporter be present during pretrial conferences conducted outside the husband's presence. The Western Section reversed the decree, recognizing that "a party litigant is obviously vitally interested in the substantive aspects of his or her case and is entitled to be present in all stages of the actual trial of the case."

The Appellee correctly argues that the rights of the parties should yield to the best interest of the children. Griffin v. Stone, 834 S.W.2d 300 (Tenn.App.1992), and Dantzler v. Dantzler, 665 S.W.2d 385 (Tenn.App.1983). However, before the best interests of the children can be properly determined, parties must have an opportunity to appropriately present their case and rebut the case of their adversaries. We believe the Court's preventing the mother from hearing the testimony of Dr.

Nordquist, or even reading it, handicaps her ability to rebut it and renders a finding as to best interest suspect.

The Appellee argues, however, that at most the foregoing is merely harmless error and, as such, does not require the judgment be set aside. Rule 36(b), Tennessee Rules of Appellate Procedure.[2] We cannot agree.

Elaborating on our analysis of the question of best interest, we note that the Trial Judge not only excluded the parents from the courtroom during the testimony of Drs. Nordquist and McCoy, but he enjoined them from reading Dr. Nordquist's testimony or his report. This prevented the Appellant from discussing with her counsel both the report and the testimony of the experts. Thus, the Appellant was unable to evaluate the accuracy of the testimony and to point out inconsistencies or omissions. In sum, the Appellant's counsel lost the benefit of all of the Appellant's insight, information and experiences during this crucial testimony. Indeed, it would be difficult to argue that this testimony was not crucial in light of the fact that the Trial Judge's ruling followed almost exactly the recommendations of the Court's expert.

To state the point a different way, we find that where a party has been denied the right to adequately prepare a

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[2] (b) Effect of Error.--A final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process.

defense, such, as here, being denied the right to hear or even read the testimony relied upon by the Trial Court in rendering its decision, we must either (1) assume prejudicial error--just as we would if the Court arbitrarily refused to let a party testify or counsel to cross-examine--or (2) find prejudice resulted to the judicial process.

Finally as to this issue, we are satisfied that the action of the Trial Judge was prompted by the purest of motives and in his sincere belief that permitting the parties to hear or read the testimony of Dr. Nordquist would result in the children being adversely affected.

As to the final issue, the Appellant asserts that the Trial Judge erred in failing to recuse himself. "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, . . ." Code of Judicial Conduct, Canon 3, Tennessee Supreme Court Rule 10. A judge should not serve as a non-legal advisor to an organization if that organization will be engaged in proceedings that would ordinarily come before him or will be regularly engaged in advisory proceedings in any court. Code of Judicial Conduct, Canon 5(B)(1), Tennessee Supreme Court Rule 10.

The question of impartiality should be judged under an objective standard. Thus, recusal is warranted when a person of ordinary prudence in the position of the judge, knowing all the

facts known to the judge, would find a reasonable basis for questioning the judge's impartiality. Alley v. State, 882 S.W.2d 810 (Tenn.Cr.App.1994).

Prior to the custody hearing the parents, children, and "other relevant reference persons" were referred by the Trial Court to "Drs. Robert Wahler and/or Vey Nordquist and/or Edwin Rogers. . . for the purpose of an evaluation touching upon issues of parenting, custody and visitation." The Trial Judge's name appeared as an advisory board member on the cover of the publication of Children's Psychological Services of Knoxville, Inc., a corporation partially owned by Dr. Wahler. The publication was distributed to all local mental health professionals as well as a number of individuals in the Knox County Schools. As part of the final order in this case, the parties and their youngest child were ordered to participate in ongoing counseling with Dr. Wahler. Moreover, Dr. Nordquist, who was chosen as the Court's expert and whose testimony was critical to the outcome of this case, was in a professional partnership known as Behavior Consultants with Dr. Wahler.

In denying the Appellant's motion for recusal, the Trial Judge offered reasons for his involvement with Dr. Wahler and Children's Psychological Services of Knoxville, Inc. He stated that he thought the organization was no longer in existence, that his involvement was limited, that he thought it

was a civic organization, and that he never rendered legal advise to the organization.

These assertions, taken as true, are not determinative. We are to focus on the appearance of impartiality from an objective point of view. Thus, the fact that he thought the corporation was no longer in existence or that his involvement with the corporation was limited does not negate the fact that his name appeared as an advisory board member on a current publication of the corporation. Also, the Code of Judicial Conduct is violated if a judge renders non-legal advice to civic or charitable organizations to an organization that would regularly come before that judge or be engaged in adversarial proceedings in any court. Code of Judicial Conduct, Canon 5(B)(1), Tennessee Supreme Court Rule 10. It is not unreasonable to foresee that the child psychologists who own Children's Psychological Services of Knoxville, Inc., would regularly be involved in adversarial proceedings as experts.

The Appellee argues that the Trial Judge's duty to recuse hinges on a showing of personal prejudice directed at the Appellant. The assertion avoids the plain meaning of the rule that "[a] judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, . . ." Code of Judicial Conduct, Canon 3, Tennessee Supreme Court Rule 10.

In our legal system, in the execution of their duties, judges should operate independently of governmental, economic, political or social influences. Alley v. State, supra. As expressed in the Code of Judicial Conduct, it is also important for judges to avoid the appearance of any effect of these influences. We do not find in the present case that the Trial Judge was actually influenced, but we do conclude that a reasonable person with knowledge of the facts could find a reasonable basis for questioning the Trial Judge's impartiality.

In conclusion as to this issue, we note the Trial Judge himself recognized his association with the psychological clinic, even though peripheral, was in technical violation of the Canon. We are satisfied that had the matter been brought to his attention prior to the hearing rather than after seven days of trial he would have recused himself.

In light of our disposition of issue two, we suggest that upon remand the Trial Judge recuse himself and request another judge be designated to hear the case when re-tried.

For the foregoing reasons the judgment of the Trial Court is vacated and the cause remanded for proceedings not inconsistent with this opinion. Costs of appeal are adjudged against Mr. Nielsen.

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Houston M. Goddard, P.J.

CONCUR:

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Herschel P. Franks, J.

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Clifford E. Sanders, Sr. J.