No. 31325 - Erica Hager v. Travis Hager

FILED
November 25, 2003
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, J., dissenting:

In this proceeding, the Court was required to determine whether the lower court was correct in denying Erica Hager's (hereinafter referred to as "Ms. Hager") petition for "joint physical custody" of her child. Instead of addressing this very narrow issue, the majority awarded Erica Hager full custody of the child. In reaching this decision, the majority states, on the first page of its opinion, that: "Most of the convoluted procedural and substantive history of this contested divorce/child custody case, which has gone on since 1997, is of no importance to the substantive issues before this Court. Consequently we omit its recital." Ironically, the only way in which the majority could justify returning the child to Ms. Hager was by omitting *this convoluted procedural history*. For the reasons stated below, I respectfully dissent.

A. The Majority Relied upon Facts Not Properly Before the Court

The majority found that the lower court erred by determining that Ms. Hager's boyfriend was a danger to her child. Therefore, the child should be returned to Ms. Hager. Simply put, this issue was not properly before the Court *in this appeal*. In 1999, the lower court awarded custody of the child to the child's father, Travis Hager (hereinafter referred

to as "Mr. Hager"), after finding that Ms. Hager violated a previous order that her boyfriend have no contact with the child. Ms. Hager filed a petition for appeal to this Court challenging the custody decision. This Court denied the petition for appeal.

When this Court denied Ms. Hager's challenge to the order awarding custody of the child to Mr. Hager, the rulings established in that order became the law of the case. We recently explained the law of the case doctrine in *State ex rel. Frazier & Oxley v. Cummings*, ___ W. Va. ___, ___, ___ S.E.2d ___, ___ (Slip Op. at 7, Oct. 15, 2003) as follows:

> The law of the case doctrine "generally prohibits reconsideration of issues which have been decided in a prior appeal in the same case, provided that there has been no material changes in the facts since the prior appeal, such issues may not be relitigated in the trial court or re-examined in a second appeal." 5 Am. Jur. 2d *Appellate Review* § 605 at 300 (1995) (footnotes omitted). "[T]he doctrine is a salutary rule of policy and practice, grounded in important considerations related to stability in the decision making process, predictability of results, proper working relationships between trial and appellate courts, and judicial economy." *United States v. Rivera-Martinez*, 931 F.2d 148, 151 (1st Cir. 1991).

Thus, Ms. Hager could not relitigate that issue because it was specifically settled and affirmed by this Court's denial of the initial petition for appeal on March 23, 2000.

B. Ms. Hager Sought Only Joint Custody of the Child

Additionally, the majority opinion awarded Ms. Hager *sole* custody of the child when Ms. Hager *did not file a petition seeking sole custody of the child.* The circuit court's order expressly stated that Ms. Hager "filed a *Petition For Modification of Child Custody* in

which she cited the passage of Senate Bill 2003 . . ., which [Ms. Hager] contended entitled her to joint physical custody of the parties' child."

Under this new law, which was passed in 1999, a parent may seek to modify a parenting plan without showing changed circumstances.[1] As a result of this new law, Ms. Hager sought to have joint custody of the child without showing a change in circumstances. The majority opinion turned Ms. Hager's relief into a request for sole custody. Morever, as previously indicated, the majority has awarded Ms. Hager sole custody based upon the relitigation of facts that could not be relitigated.

C. The Best Interest of the Child Is No Longer the Pole Star in West Virginia.

Lastly, this Court has traditionally held that "[t]he pole star in child custody cases is the welfare of the child." *David M. v. Margaret M.*, 182 W. Va. 57, 60, 385 S.E.2d 912, 916 (1989). *Accord* Syl. pt. 5, *Carter v. Carter*, 196 W. Va. 239, 470 S.E.2d 193 (1996) ("In visitation as well as custody matters, we have traditionally held paramount the best interests of the child."). Indeed, "all parental rights in child custody matters are subordinate to the interests of the innocent child." *David M.*, 182 W. Va. at 60, 385 S.E.2d at 916. That is "[c]ases involving children must be decided not just in the context of competing sets of adults' rights, but also with a regard for the rights of the child(ren)." Syl. pt. 7, *In re Brian*

[1]Senate Bill 2003 was modified in 2001. The laws which relate to modifying a parental plan are codified at W. Va. Code §§ 48-9-401 to 48-9-403.

D., 194 W. Va. 623, 461 S.E.2d 129 (1995). Until the decision in the instant case, "[t]his Court ha[d] not deviated from that principle, and it ha[d] become the ultimate benchmark by which all custody decisions are appraised." *In re Frances J.A.S.*, ___ W. Va. ___, ___, ___ S.E.2d ___, ___ (Nos. 30909 & 30910, June 18, 2003).

From May 1998 until the issuance of the mandate in this case, the child has lived in West Virginia with her father and grandparents. The majority opinion, without any justification, has ripped this child from the stability of her life in West Virginia and ordered her to be removed to Florida to start a new life. This decision is not in the best interests of the child. It is in Ms. Hager's best interest.

During the proceedings underlying the case *sub judice*, the lower courts have made the following findings regarding the child's life in West Virginia:

> That the infant child . . . in her testimony, testified that she was very happy residing with her father and grandparents, she is happy where she lives and the family is very good to her.
>
> That [the child] completed kindergarten and first grade in the last two years, has had perfect attendance, has been an exemplary student, and has received numerous awards from the school staff. [The child] was described as a happy child and getting along well.
>
> . . .
>
> Since the [child was given to her father], [she] has flourished in her educational and social achievement and activities.
>
> [The father] has been an active, involved, loving, and supportive parent

> in his attendance, transporting, and participating in educational, social and recreational programs and activities with [the child].

In rendering its decision, however, the majority has clearly ignored this evidence which conclusively demonstrates that the best interests of the child is with her father and in her home in West Virginia. Instead, the majority opinion examined the best interest of Ms. Hager and concluded that she should have the child. By subordinating the child's best interests to that of Ms. Hager, the majority did not merely uproot the child's entire world–the majority has forced this child to live in a home in Florida with a man who was determined by this Court in 2000 to be a clear and present danger to the child.

For the foregoing reasons, I respectfully dissent.