

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000039-MR

CYNTHIA M. FEE

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE JAMES MICHAEL GREEN, JUDGE
ACTION NO. 81-CI-11610

JAMES J. SMITH

APPELLEE

OPINION AFFIRMING IN PART
AND REVERSING IN PART AND REMANDING
** ** * * * * *

BEFORE: COMBS, DYCHE, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from a judgment modifying child support after a change in custody. Appellant argues that the trial court's award of child support was too low because of erroneous rulings on issues related to the determination of child support. Upon consideration of these arguments in light of the record herein and the applicable law, we affirm in part and reverse in part and remand.

The marriage of the parties was dissolved by decree on January 13, 1983. In the initial decree, appellant, Cynthia Fee, was granted custody of the parties' two minor children, Julie, born February 23, 1979, and Donovan, born November 21, 1977. On

July 2, 1993, appellee, James Smith, was granted custody of both children, and Cynthia was thereafter ordered to pay child support to James. On March 10, 1995, Julie was removed from James's home and placed in Cynthia's custody. Cynthia then moved for modification of child support based on the custody change on April 26, 1995. Apparently, Donovan also moved back into Cynthia's home (voluntarily) on December 31, 1996.

After two hearings and the taking of depositions, the court found Cynthia's adjusted monthly income, for purposes of determining child support, to be \$3,314.00 a month. James's monthly income was found to be \$5,333.00 per month, or \$64,000 a year. Using the child support guidelines, the court ordered James to pay Cynthia \$879.00 per month from April 26, 1995 through May 1996. (Donovan turned eighteen (18) years of age on November 21, 1995 and graduated from high school in May of 1996.) From June 1996 through February 1997, James's child support obligation was \$584.00 a month for Julie. The court found that Julie was emancipated on the date of her eighteenth birthday (February 23, 1997) since she was no longer attending high school on that date because she had gone on to enroll in college. Pursuant to a motion by both parties to amend the judgment, the court altered the judgment, ruling that James owed child support from April 1995 through December 1995 for only one child because Donovan lived with James until January of 1996. Thus, the court recalculated the child support for that period to be \$546.00 a month. Cynthia now appeals from the child support awards in both orders.

Cynthia first argues that the trial court erred in finding that Julie was emancipated at the time of her eighteenth birthday. KRS 403.213(3), as it existed at the time of the hearing, provided that child support shall be terminated by emancipation of the child at age eighteen unless the child is a high school student when she reaches the age of eighteen. In that case, child support shall continue while the child is in high school, but not beyond the completion of the school year during which the child turns nineteen years of age.

At the time of Julie's eighteenth birthday, although she had neither dropped out of high school nor graduated from high school, Julie was enrolled at the University of Louisville as a college student carrying a full load of courses. The evidence established that Julie was taking courses at the University of Louisville as part of a partnership between the college and her high school whereby an advanced program student who has accelerated through most of his or her high school requirements is allowed to take classes at the college as a visiting high school student. The student is given high school credit for the college classes to the extent that she has any further requirements to complete. At the time of the hearing in this case, the only requirement that Julie needed to complete her high school credits was senior English, and the college freshman English class she was taking was to fulfill that requirement. The trial court adjudged that, even though Julie had not yet graduated from high school, the fact that she was carrying a full load of college classes and was not living with either parent was

evidence that she was fully emancipated under the statute. (At the time, Julie was living with her brother in a house which was owned by Cynthia.) We do not agree.

A trial court's findings of fact in domestic matters will not be reversed unless they are clearly erroneous. Ghali v. Ghali, Ky. App., 596 S.W.2d 31 (1980); CR 52.01. A finding of fact is clearly erroneous if it is not supported by substantial evidence. Black Motor Co. v. Greene, Ky., 385 S.W.2d 954 (1964). We believe the trial court was clearly erroneous in finding that Julie was emancipated under the statute. The statute specifically mandates that "court-ordered support shall continue while the child is a high school student." KRS 403.213(3). Julie was considered by her high school to still be a student of the high school at the time she was taking classes at the University of Louisville. She had not yet graduated from high school, and one of the college classes went toward the completion of her requirements for high school graduation. Further, the program which allowed her to take the college classes while still a high school student was undertaken in conjunction with the high school. In our view, the child and the custodial parent should not be penalized for the child's progress and desire to get the most out of her high school education. The fact that Julie was not residing with either parent at the time is not a controlling factor because the statute mandates that support continue while the child is still in high school and makes no mention of a requirement that the child be living with a parent. Thus, the

court's child support award for Julie should be extended through May of 1997.

Cynthia next argues that the trial court erroneously computed James's income for purposes of determining child support. The trial court, relying on James's 1995 income tax return, found James's income to be \$64,000.00 a year. Cynthia maintains that James's income was far greater than \$64,000.00 a year, but provided no evidence thereof except evidence that James and his present wife built a home in 1994 with a tax assessed value of \$491,241.00 and acquired a 20% interest in two hotels in Florida with an initial investment of \$400,000, which was 100% financed. There was also evidence that James's income had sharply decreased in 1995 from 1994 when he earned over \$100,000. A trial court's findings regarding a party's income for child support purposes will not be disturbed unless they are clearly erroneous. Barnes v. Barnes, Ky. App., 772 S.W.2d 636 (1989). In the present case, we cannot say the court's finding as to James's income was clearly erroneous. The 1995 tax return was apparently James's most recent tax return at the time of the hearing, as the 1996 return had not been completed as of that date. As to the court's determination of income from the 1995 return, which Cynthia claims was inaccurate due to the court's neglecting to include certain income contained therein, we cannot find the 1995 return in the record and Cynthia does not point to where the document is in the record as required by CR 76.12(4)(c)(iii) and (iv). As to the evidence relative to the house built by James and his wife, we do not believe this is

convincing evidence of James's income. The house was purchased with his wife and there was no evidence as to her income. Also, the house was built in 1994, and James explained that his income had dropped since then because he had started his own business and had significantly fewer clients as a result. The same can be said for the evidence regarding the investments in the two hotels. In the absence of any substantive evidence that James's income was greater than \$64,000.000, the trial court's finding to that effect will not be disturbed.

The next assignment of error that we will address is Cynthia's claim that the trial court should have awarded her attorneys fees due to James's obstructive tactics and failure to cooperate in turning over information regarding his income. The allocation of attorneys fees in a domestic case is entirely within the discretion of the trial court and is not mandatory. Underwood v. Underwood, Ky. App., 836 S.W.2d 439 (1992). In its order of July 11, 1997, the court attributed the delay in obtaining information regarding James's income to both parties. Given this finding and the fact that there was not a gross imbalance in the parties' incomes, we cannot say that the trial court abused its discretion in not awarding Cynthia attorneys fees.

Cynthia's next argument is that the trial court provided inconsistent and incomplete relief. Cynthia points to certain mathematical errors that the court made in its calculations regarding child support in the amended order. In reviewing the order, it does appear that the court made

mathematical errors in determining James's child support obligation for the period of April 1995 through December 1995. The court mistakenly determined that James's share of child support was 59.6%, when James's share of the child support obligation should have been 61.7%. The proper total per month during that period would then be \$584.00 instead of \$546.00.

Regarding both parties' assertion that the court improperly credited James for temporary child support payments, we cannot discern from the court's opinion, the record, or the parties' briefs what the correct amount should be. However, since both parties agree that the amount is incorrect, we remand for a recalculation of this figure.

As to Cynthia's motion to allocate medical expenses of the children, which the court failed to rule on, upon reviewing the record, we do not see where Cynthia brought this failure to the trial court's attention as required by CR 52.04. Thus, it was not properly preserved.

Lastly, Cynthia claims that the court should have made its award of child support retroactive to March 1995, when she actually got custody of Julie. KRS 403.213 only allows child support orders to be modified as to installments accruing subsequent to the filing of the motion for modification.

For the reasons stated above, the court's award of child support is affirmed in part and reversed in part and remanded for recalculation consistent with the dictates of this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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