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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2006-CA-000760-ME

CURTIS FRED SCOTT — APPELLANT

v.

APPEAL FROM GREEN CIRCUIT COURT
HONORABLE DOUGHLAS M. GEORGE, JUDGE
ACTION NO. 02-CI-00100

LELA CAROL SCOTT — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: STUMBO AND WINE, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Curtis Fred Scott appeals from an order of the Green Circuit Court that increased his child support obligation based on the emancipation of one of his two children. Curtis contends that his child support obligation should not be increased because his son, for whom Curtis is the primary custodian, is still wholly

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

dependent on his parents given his intellectual and functional disabilities. After reviewing the record, the law, and the arguments of counsel, we affirm.

Curtis and Lela Scott were married in 1981 and had two children, Andrew Justin Scott, born on November 8, 1986, and Allie Kristin Scott, born on April 30, 1994. On June 1, 2004, the circuit court entered a decree of dissolution of marriage that awarded the parties joint custody with Curtis being the residential custodian for Andrew and Lela being the residential custodian for Allie. Child support was to be determined after further discovery.

In October 2004, the court ordered Curtis to pay $234.10 per month in child support based on the parties' incomes under the Kentucky Child Support Guidelines codified in Kentucky Revised Statute (KRS) 403.212. Following an appeal to this court,[2] the circuit court entered an Agreed Order on April 15, 2005, requiring Curtis to pay child support of $75 per month.[3]

Andrew turned 18 years of age in November 2004, and he completed high school in May 2005. On July 1, 2005, Lela, who continued to have custody of the parties' daughter, filed a motion seeking an increase in child support based on the emancipation of Andrew. In response, Curtis filed an affidavit with extensive supporting

[2] *See* Case No. 2004-CA-001282 (Direct) and 2004-CA-001425 (Cross). These appeals involved challenges to the child support order but were dismissed based on a joint motion to dismiss filed by the parties.

[3] The child support obligation was determined by calculating the amount owed by the non-custodial parent to the other for each of the two children with an offsetting credit given each parent for the amount owed the other. Since Curtis's income was higher, he owed a greater percentage of the combined child support, and thus, he alone was required to make payments. *See* KRS 403.212(b) (involving split custody situations).

documentation indicating that he had contributed approximately $50,000 to initiate a dairy cattle operation with several cattle, a barn, and farm equipment. Curtis also filed documents relating to Andrew's psychological/educational testing and his functional mental disability. Following a hearing, the circuit court entered an order on February 1, 2006, granting Lela's motion to increase Curtis's monthly child support obligation to $395 retroactive to June 2005. Curtis filed a Kentucky Rule of Civil Procedure (CR) 59.05 motion to alter, amend, or vacate the order, which the circuit court summarily denied. This appeal followed.

Curtis contends that the circuit court erred by failing to require Lela to continue to provide child support for Andrew past his 19th birthday, thereby increasing his child support payments. KRS 403.213 provides in relevant part that unless otherwise agreed or provided in a divorce decree, child support payments shall be terminated by emancipation when a child reaches the age of 18, unless he or she is in high school, in which case, the court-ordered support shall continue while the child is in high school but not beyond the school year during which the child reaches the age of 19.[4]

[4] *See generally Bustin v. Bustin*, 969 S.W.2d 697 (Ky. 1998). *See also* KRS 405.020, which sets forth the general legal responsibility of the parents to support their minor children until the age of emancipation. KRS 405.020(1) states that "[t]he father and mother shall have joint custody, nurture, and education of their children who are under the age of eighteen (18) . . . . The father shall be primarily liable for the nurture and education of his children who are under the age of eighteen (18) and for any unmarried child over the age of eighteen (18) when the child is a full-time high school student, but not beyond completion of the school year during which the child reaches the age of nineteen (19) years."

However, the legislature has extended parental responsibility for the support of disabled children who are dependent beyond the normal age of majority. KRS 405.020(2) states:

> The father and mother shall have joint custody, care, and support of their children who have reached the age of eighteen (18) and who are wholly dependent because of permanent physical or mental disability. If either of the parents dies, the survivor, if suited to the trust, shall have the custody, care, and support of such children.

Since this statute creates an exception to the general rule terminating support obligations once a child reaches age 18, the party seeking to utilize this exception bears the burden of establishing the elements of the statute, that being the child suffers from a physical or mental disability and is wholly dependent because of the disability.

In *Abbott v. Abbott*, 673 S.W.2d 723 (Ky.App. 1983), this court held that KRS 405.020(2) controlled situations involving a severely handicapped child. This court stated that "[u]nder this statute, a wholly dependent child is not emancipated by operation of law at the time at which he becomes eighteen years of age." *Id*. at 726.[5] The court further held that the circuit court retains jurisdiction over the previous support decree affecting a disabled adult child and indicated that the determination of whether the

[5] The *Abbott* case involved prior versions of KRS 403.250 and KRS 405.020. The version of KRS 403.250(3) cited by the court dealing with the general rule terminating parental support obligations by emancipation of the child at the age of eighteen has been substantially recodified in KRS 403.213(3) with modifications providing for extending support until age nineteen for children still enrolled in high school. The version of KRS 405.020(2) relied upon by the *Abbott* court has been recodified by placing portions into two sections, KRS 405.020(1) and (2). These changes, however, do not materially alter the substantive validity of the rulings in the *Abbott* decision.

child is "wholly dependent" is a factual finding subject to the clearly erroneous standard of appellate review.[6] *Id*. A factual finding is clearly erroneous if it is not supported by substantial evidence. *Vinson v. Sorrell*, 136 S.W.3d 465, 470 (Ky. 2004); *Gosney v. Glenn,* 163 S.W.3d 894, 898 (Ky.App. 2005). "Substantial evidence" is evidence that a reasonable person would accept as adequate to support a conclusion and "when 'taken alone or in the light of all the evidence has sufficient probative value to induce conviction in the minds of reasonable men.'" *Vinson*, 136 S.W.3d at 470 (quoting *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003)). *See also Hunter v. Hunter*, 127 S.W.3d 656, 659 (Ky.App. 2003). Due regard must be given to the opportunity of the trial court to judge the credibility of the witnesses and weigh the evidence, and mere doubt as to the correctness of a finding does not justify reversal. *Vinson, supra*; *Sherfrey v. Sherfrey*, 74 S.W.3d 777, 782 (Ky.App. 2002).

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[6] *See also Turner v. Turner*, 441 S.W.2d 105, 107 (Ky. 1969) ("What constitutes an emancipation is a question of law, but whether an emancipation has occurred in a particular case is a question of fact."); *Dunson v. Dunson*, 769 N.E.2d 1120, 1123 (Ind. 2002) ("What constitutes emancipation is a question of law, while whether an emancipation has occurred is a question of fact."). *See generally* Amy P. Hauser, Notes, *Child Custody for Disabled Adults: What Kentucky Families Need*, 91 KY. L. J. 667 (2002-2003). Curtis urges this court to apply an independent *de novo* standard of review, while Lela maintains that an abuse of discretion standard applies. Both the parties agree that as a general matter, establishment, modification, and enforcement of child support within the statutory parameters is left largely within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *See, e.g., Van Meter v. Smith*, 14 S.W.3d 569, 572 (Ky.App. 2000); *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky.App. 2001). Curtis states the *de novo* standard should apply because "the trial court did not give due consideration to the child's needs in this case." Curtis's position basically raises an abuse of discretion argument that would not justify an independent *de novo* review by this court. Moreover, we believe that the more deferential clearly erroneous standard of review is more appropriate because the determination of whether the child is "wholly dependent" concerns factual issues related to the child's intellectual and functional abilities, as well as his prospects for economic self-sufficiency.

In this case, there is no dispute that Andrew suffers from a mental disability, in that he has a significant learning disability, and that he does not suffer from any physical disabilities. The issue is whether Andrew's mental disability renders him incapable of being self-sufficient in his personal necessities and ability to earn income sufficient to provide for his reasonable living expenses. *See generally Heitzman–Nolte v. Nolte*, 837 A.2d 1182 (Pa. Super. 2003); 59 AM. JUR. 2D *Parent and Child* § 77-78 (2002).

The educational testing procedures indicated that Andrew's performance is very low in basic reading and writing skills, reading comprehension, math calculation, and reasoning skills. The evaluators and teachers, however, stated that Andrew was cooperative and attentive; he interacted normally with fellow students and teachers; and he had no deficits with motor skills, concentration, or speech. Although, as pointed out by Curtis, a certificate of completion is not the functional equivalent of a high school diploma, Andrew did perform sufficiently within his special education classes while in high school so as to qualify for recognition as having completed his high school education.

At the hearing, Curtis testified that while Andrew required assistance in handling the accounting aspects of the farm operation, he was able to perform most farm duties on his own, including the care and handling of cattle and the operation of farm equipment. Curtis sometimes spent several days away from home related to his job, and Andrew was able to handle basic daily living tasks, such as cooking and cleaning, in

addition to working on the farm without direct supervision, during Curtis's absences.

Andrew has acquired a driver's learning permit, and Lela testified that he often transported his younger sister between the parties' residences for visits. Curtis testified that he intended to give the farm property, cattle, and equipment to Andrew in the expectation that Andrew will be able to operate the dairy operation on his own at some point in the future. In addition, Andrew currently receives $579 per month in federal social security supplemental security income (SSI) benefits, subject to reduction if the dairy operation becomes profitable.

The evidence indicates that Andrew is able to function relatively independently with respect to both his personal needs and physical work duties. He is especially capable, experienced, and confident in performing farm-related tasks. Andrew's mental disability creates limitations primarily with his reading and mathematical abilities and is not so severe that it renders him incapable of earning a sufficient income for his reasonable living expenses or handling his basic daily living needs. Thus, we conclude that Curtis has not satisfied his burden of showing that Andrew is wholly dependent. As a result, the trial court's finding that Andrew is not wholly dependent and is emancipated is supported by substantial evidence and, thus, is not clearly erroneous.

Curtis relies in part on the case of *Williams v. West*, 258 S.W.2d 468 (Ky. 1953), which involved an adult child with Jacksonian epilepsy. The court in that case stated:

> "[this] illness is characterized by convulsions particularly involving the right arm and face, and there is usually a lassitude and weakness of several days' duration preceding and following each attack. Either because of a mental involvement or on account of a complex arising from his illness, he is moody, depressed, and at times suffers loss of memory."

*Id*. at 470. Despite his handicap, the adult child in that case was able to obtain employment for several months in the mid-1940's during the war, although he was frequently absent because of his illness, but he was discharged because of his epileptic seizures. The court affirmed the trial court's finding that the child was wholly dependent on his parents due to his inability to support himself because of his illness. Curtis maintains the *Williams* case teaches that a child is not considered emancipated simply because he has turned 18 and may be able to earn some money for himself at some point.

The *Williams* case does not require reversal of the trial court's decision in this case. In *Williams*, the court stated that "[t]he testimony establishes beyond question that Bruce, on account of his physical and mental condition, is unable to support himself." *Id*. at 473. By contrast, the evidence in this case indicates that Andrew can reliably perform manual labor, especially in the farming sector. He does not suffer from a physical disability that will seriously hamper his ability to maintain employment. While his job prospects may be restricted by his mental and intellectual limitations, we cannot say that Andrew is wholly dependent because of his disability.

The order of the Green Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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