

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-002110-ME

ROY HUGH HILL, JR.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE PAULA SHERLOCK, JUDGE
ACTION NO. 97-FC-006425

LINDA GAIL HILL

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, COMBS, AND THOMPSON, JUDGES.

CAPERTON, JUDGE: The Appellant, Roy Hugh Hill, Jr., filed this action to terminate his child support obligation for Alex, the twenty-year-old child of he and the Appellee, Linda Gail Hill. Below, Linda claimed that Alex is wholly dependent on her because of cognitive deficits. The trial court entered a

September 14, 2010, order requiring Roy to continue to pay child support until such time as Alex finds employment after completion of vocational rehabilitative training, or through a supportive employment program. Roy appeals, asserting that Linda failed to meet her burden of proof to establish that Alex was wholly dependent upon his parents. After a thorough review of the record, the arguments of the parties, and the applicable law, we affirm.

On May 1, 1992, Linda petitioned the trial court for the dissolution of the parties' marriage. Early in the following year, the court entered the divorce decree, in which it ordered that Roy pay child support for his two minor sons. Alex, the youngest, is now twenty years old. At the time Alex turned nineteen and had graduated from high school, Roy filed a motion to terminate child support. Linda objected to the motion, claiming that Alex was wholly dependent upon her. To support that assertion, Linda attached the September 10, 2007, report of Dr. William Riley, following a four-hour assessment after which Dr. Riley diagnosed Alex with Asperger's Disorder, and found that he suffered from certain deficiencies in the areas of verbal skills, reading comprehension, and mathematics.¹

Linda states that Alex is wholly dependent upon her and has an Axis 1 diagnosis of Asperger's Disorder with a GAF score of 50, meaning "Serious

¹ Roy asserts that the report of Dr. Riley proves the opposite of what Linda asserts. While Roy does not disagree that Dr. Riley diagnosed Alex with Asperger's, he notes that Dr. Riley recounts Linda's statement that she had previously taken Alex to another psychologist who found that Alex fell short of meeting the full criteria of Asperger's Disorder. Further, Roy states that in considering Alex's potential for Asperger's Disorder, Dr. Riley made specific note of Alex's work potential. Roy directs our attention to Dr. Riley's belief that Alex had some potential for trial-level vocational-technical training, and that with mild help Alex was capable of achieving a successful vocational career.

Symptoms” as stated in the September 10, 2007, report of Dr. Riley. Linda states that in addition to Dr. Riley’s report, she also submitted multiple reports from Jefferson County Public Schools which she asserts indicated mild to severe deficits in Alex’s abilities to perform within the normal range of his age.² She also states that all of Alex’s test scores indicate moderate to severe deficiencies in his abilities as well as an IQ range of 79-80.

Roy asserts that the record shows the contrary, namely, that on May 17, 2010, at the time of Alex’s graduation, the Jefferson County Public School System Exceptional Child Education Committee met to review Alex’s progress and current condition and found that Alex did not meet the criteria for Asperger’s Disorder. The Committee ultimately found that, “While Alex may have some behavioral aspects of Asperger’s, it [is] not considered to be significant in its manifestation or adversely affecting his educational performance.” Roy asserts that Linda’s assertions are also contradicted by other reports, indicating Alex’s ability to perform the day-to-day activities of life without difficulty. This includes a Comprehensive Vocation Evaluation, conducted between June 7 and June 10, 2010, by social worker Denna Griffith, which indicated that “[Alex] reported he

² Specifically, Linda refers to a Communication Written Report dated May 5, 2010 by speech language pathologist, Mark Epstein, which she states indicates that, “There is evidence that the student’s communication disorder adversely affects his/her educational performance.” Additionally, she states that a May 5, 2010, psychological assessment conducted by Beora Williams indicated that, “On the Asperger’s scale submitted by his teachers, he was in the probable range based on one teacher’s ratings, and on the possible or borderline range on another’s.” That report concluded that Alex may in fact be on the spectrum of Asperger’s Disorder.

has experience with general house cleaning, doing the laundry, and cooking. Mr. Hill stated that he performs all self-care abilities without assistance.”

The evidence further establishes that Alex graduated from Mary Ryan Academy,³ which is part of the Jefferson County School System, and is a special education school for students with emotional or mental disabilities that make it difficult for them to be successful in mainstream educational institutions. According to Linda, Alex has been receiving services from the Kentucky Department of Vocational Rehabilitation since October 27, 2007. A letter dated May 18, 2010, from Mary Beth Schoen, Office of Vocational Rehabilitation, confirms that Alex is receiving services based on a diagnosis of Asperger’s Disorder and Attention Deficit Disorder. Schoen stated that Alex has not been able to become employable to date. According to the record, Alex has, however, volunteered at a YMCA-shelter house where his duties included cleaning the gym, organizing activities, mopping floors, and taking out the trash.⁴

Initially, the circuit court entered an August 3, 2009, order directing Roy to pay child support until the conclusion of the 2009-10 school year, as it found no information to indicate that Alex could live independently at the time. As noted, Hill complied with that order and made a motion to terminate his support obligation on May 13, 2010. A hearing was held, after which the court entered its

³ The high school has a maximum of 32 students, with 6-8 students per classroom. Classrooms have at least one teacher and one assistant, and are fully contained for close supervision of students. Curriculum is adjusted according to student ability.

⁴ See Comprehensive Vocational Evaluation performed by Denna Griffith, BSW, between June 7 and June 10, 2010.

aforementioned September 14, 2010, order finding that Alex remained wholly dependent on Linda and ordering Roy to continue paying support. Roy filed a motion to alter, amend, or vacate the court's order which was denied. In denying that order, the court again cited to the report of Dr. Riley and the reports of the Jefferson County Public Schools⁵ including the Comprehensive Vocational Evaluation conducted on Alex, which the court found indicative of potential Asperger's Disorder, behavioral concerns, and difficulties in self-sufficiency.⁶ The court did, however, amend its ruling to allow for a one-year review of this matter. Roy now appeals to this Court.

On appeal, Roy asserts that throughout this entire proceeding, Linda has not submitted any evidence to establish that Alex's cognitive deficits render him permanently disabled, or wholly dependent on his parents.⁷ Further, he argues that the record contains no evidence to link any disability that Alex may or may not have to his unemployment. Indeed, Roy argues that the only conclusion in the record that states that Alex is unemployed and wholly dependent upon his parents

⁵ Specifically, the court references the January 25, 2010, JCPS report which it asserts diagnosed Alex with Asperger's, stating, "[H]e (Alex) may exhibit characteristics of Asperger's type behavioral concerns . . . If one were to interpret historical parent information and language development, it would appear that Alex may, in fact, be on the spectrum of Asperger's disorder with primary behavioral concerns identified for his highly impulsive behaviors that adversely affect his ability to maintain good focus and attentiveness."

⁶ Which the court noted indicated that "enrollment into the Carl D. Perkins Vocational Training Center would be beneficial in that he (Alex) would be taught job-related skills and behaviors with hands-on training program. If Mr. Hill remains in his home area, Support Employment would be needed."

⁷ Roy also asserts that another psychologist had previously concluded that Alex did not meet the criteria for Asperger's. However, this psychologist was not named, and his report is not included in the record.

is Linda's own opinion. Thus, he argues that Linda has failed to meet the burden of proof to establish dependence as set forth in KRS 405.020(2), and that the trial court made an unwarranted determination that having a cognitive disability automatically makes a person wholly dependent. Accordingly, Roy asserts that the decision of the trial court was not based on substantial evidence.

In response, Linda argues that the trial court did not err in finding that Alex has a permanent mental disability which causes him to be wholly dependent upon her. She asserts that this Court is unable to substitute its judgment for that of the trial court on this finding of fact unless that finding was clearly erroneous. She argues that the evidence submitted supports the findings of the trial court in this regard, and directs our attention to the aforementioned reports of Dr. Riley and the Jefferson County School System which she asserts support the trial court's ruling.

In reviewing the arguments of the parties, we note that the circuit court retains jurisdiction over its previous support decrees affecting a disabled adult child. *See Abbott v. Abbott*, 673 S.W.2d 723 (Ky. App. 1983). Indeed, as a general matter, the establishment, modification, and enforcement of child support within the statutory parameters is left largely in the sound discretion of the trial court, and will not be disturbed absent an abuse of discretion. *Van Meter v. Smith*, 14 S.W.3d 569, 572 (Ky. App. 2000). Further, the determination of whether the child is "wholly dependent" is a factual finding subject to the clearly erroneous standard of appellate review. *See id.* and CR 52.01. 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). Substantial evidence is that evidence which a reasonable person would accept as adequate to support a conclusion, and which, when taken alone, or in the light of all the evidence, has sufficient probative value to induce conviction in the minds of reasonable men. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). Finally, we note that due regard must be given to the opportunity of the trial court to judge the credibility of the witnesses, and to weigh the evidence presented. *Sherfrey v. Sherfrey*, 74 S.W.3d 777, 782 (Ky. App. 2002)(*overruled on other grounds by Benet v. Commonwealth*, 253 S.W.3d 528 (Ky. 2008)). We review this matter with these standards in mind.

Turning to the applicable law, we note that KRS 405.020(2) provides as follows:

The father and mother shall have the 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.

As Roy correctly notes, this statute creates an exception to the general rule terminating support obligations once a child reaches age 18.⁸ Accordingly, the party seeking to utilize the exception has the burden of establishing the elements set forth in the statute, namely, that the child at issue suffers from a physical or mental disability which makes the child wholly dependent upon his or her parents.

⁸ See KRS 403.213.

Sub judice, it is clear that Alex does not suffer from any physical disabilities, or if so, they have not been identified in the record. Thus, the sole question for our review is whether the circuit court correctly determined that Alex has a mental disability which is of a nature significant enough to render him incapable of being self-sufficient. Without question, the evidence before the court on this point was somewhat conflicting. However, as we have noted, and as is the clearly established law of this Commonwealth, it is the trial court, and not the appellate court, that has the sole authority to determine the credibility of the witnesses, to draw reasonable inferences from the evidence, and to weigh conflicting evidence. *See Whittaker v. Rowland*, 998 S.W.2d 479 (Ky. 1999).

It is the province of this Court to determine whether or not the trial court's decision in this regard was supported by substantial evidence. Having reviewed the record, and the reports relied upon by the circuit court, we cannot find that it erred in finding as it did, even if we may have found differently had it been our province to make the factual determinations in this matter. *See City of Newport v. Schmit*, 191 Ky. 585, 231 S.W. 54 (1921). The court's determination in this matter was sufficiently supported by the evidence, as was its decision to set this matter for a one-year review from the date of its order. Obviously the trial court's decision to review the matter in one year is significant and a recognition by that court that rehabilitative efforts by Alex may change the level of support. Thus, the level of support is properly the subject of review as rehabilitative efforts progress. Accordingly, we affirm.

Wherefore, we hereby affirm the September 14, 2010, order of the Jefferson Circuit Court.

COMBS, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE
OPINION.

THOMPSON, JUDGE, DISSENTING: I respectfully dissent from the majority opinion because I disagree that the mother met her burden of proof to overcome the presumption that child support should not be terminated because Alex is over eighteen-years old and has graduated high school. I believe that when the physical or mental disability of a child is contested, the party seeking to invoke the exception to KRS 405.020 must produce expert testimony supporting the claim. Specifically, while certainly a diagnosis of the child's physical and mental condition is relevant, the ultimate question is whether the child is capable of gainful employment. In this case, the evidence is woefully inadequate to meet the burden of proof required.

The expert testimony consists of a report from Dr. Riley who, in 2007, diagnosed Alex with Asperger's Disorder and deficiencies in the areas of verbal skills, reading comprehension, and mathematics. However, since 2007, Dr. Riley has not assessed Alex's employment skills. Moreover, even at the time of his diagnosis three years prior to Alex's high school graduation, Dr. Riley believed that Alex had potential for trial-level vocational technical training and could achieve a successful vocational career with assistance.

The additional evidence submitted was scant. However, the Jefferson County Schools' report indicates that Alex does not suffer from Asperger's Disorder or Autism. After testing, behavioral observation and a teacher interview, it was concluded that Alex exhibited a moderately mixed receptive/expressive language disorder. No opinion was expressed regarding his ability to maintain employment.

Alex has been receiving vocational rehabilitation services since October 2007 and was enrolled at a vocational center, but withdrew because he was unhappy because it lacked cell phone service and the rules imposed required him to live in a dorm and controlled his recreational and shopping time.

The most recent evaluation of Alex's employment potential, and the most compelling evidence, is the comprehensive vocational evaluation completed in June 2010. It was noted that Alex was able to perform all household chores and perform all self-care unassisted. The report concluded with the recommendation that Alex be reenrolled in vocational training to be taught job skills and behaviors.

I have reviewed the record including the hearing and must conclude that the evidence is insufficient to meet the burden of establishing that Alex cannot be an independent and productive citizen. I am convinced that an impediment to his employment possibilities greater than his mental ability is his lack of compliance with the vocational rehabilitation recommendations and program. Unfortunately, many high school graduates face a troubled economy and low skill levels resulting in continued unemployment. However, the exception to KRS

405.020 and its presumption that support terminated at the age of eighteen or high school graduation cannot be overcome by mere unemployment.

For the reasons stated, I would reverse.

BRIEFS FOR APPELLANT:

J. Gregory Joyner
Tyler F. Stebbins
Louisville, Kentucky

BRIEF FOR APPELLEE:

Linda Gail Hill
Louisville, Kentucky