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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001955-MR

FREDERICK KOSZAREK — APPELLANT

v.

APPEAL FROM CAMPBELL FAMILY COURT
HONORABLE RICHARD A. WOESTE, JUDGE
ACTION NO. 07-CI-01585

MARGARET MINZNER — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, J. LAMBERT AND STUMBO, JUDGES.

STUMBO, JUDGE: Frederick Koszarek, *pro se*, brings this appeal of a motion to alter, amend or vacate filed in a matter concerning his child support recoupment in Campbell Family Court. We hold that the trial court did not err when it required Koszarek to undergo an additional psychological evaluation because the trial court doubted the validity of the previous evaluation. We also hold that the plain language in the parties' agreement in this case did not bar the trial court from

directing the parties to participate in any sort of alternate dispute resolution, or from appointing a guardian *ad litem* (GAL). Finally, we affirm the trial court's orders allowing child support recoupment.

Relevant Facts

The majority of the relevant facts for this appeal were provided in the first appeal to this Court:

> Frederick and Margaret Minzner were married on July 5, 2003, and had a daughter in 2005. Following a separation, Margaret obtained an emergency protection order ("EPO") in Indiana against Frederick that also granted her sole custody of the parties' daughter. Frederick then filed the underlying petition for dissolution in Campbell Family Court on October 10, 2007. The family court referred the parties to mediation on the contested issues of child custody, a parenting schedule, and child support. The parties successfully mediated an agreement whereby Frederick agreed to pay $901.52 per month in child support to Margaret on the basis that at that time she had sole custody of the parties' daughter. In a later hearing, the family court did not extend full faith and credit to the Indiana EPO, and awarded Frederick temporary joint custody. Thereafter, the parties entered into a partial property settlement agreement whereby, in lieu of paying certain marital debts, Frederick "waives his right to claim an offset for child support, although he is currently operating under a shared parenting arrangement."
>
> Frederick subsequently moved to modify his child support obligation on the basis that by the family court's order, the parties now shared joint custody of their minor child and thus, he now shared more time with the minor child. Opposing the motion, Margaret argued that Frederick waived his right to modify the temporary child support order on the basis of timesharing when he waived his right to claim an offset for child support in the settlement agreement. Frederick claimed he did not

> waive his right to modify; rather, that the clause referred to overpayments of child support he believed he made following the court's award of joint custody. The family court found that Frederick waived his right to modify his child support obligation on the basis of timesharing, and therefore any modification must be based on a change of circumstances other than timesharing.

Koszarek v. Minzner, No. 2011-CA-002116-ME, 2013 WL 645907, at 1 (Ky. App. 2013). This Court ultimately reversed in that action, finding that the circuit court erred under the terms of the parties' agreement when it failed to revisit Koszarek's child support obligations. *Id.* at 2. On remand, Minzner conceded that she had been overpaid child support above the 15% threshold necessary to establish a rebuttable presumption of a material change in circumstances under Kentucky Revised Statutes (KRS) 403.213(2). The circuit court also held a hearing concerning whether Minzner had an accumulation of those benefits in order to provide recoupment. The circuit court also ordered the appointment of a GAL. Though the circuit court permitted Koszarek to recover past child care payments, it denied Koszarek any child support recoupment. This appeal follows.

Analysis

As a preliminary matter, we note that Minzner has chosen not to file an appellee brief in this case. Kentucky Rule of Civil Procedure (CR) 76.12(8)(c) "provides the range of penalties that may be levied against an appellee for failing to file a timely brief." *St. Joseph Catholic Orphan Soc'y v. Edwards*, 449 S.W.3d 727, 732 (Ky. 2014). At our discretion, we may "(i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's

brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case." CR 76.12(8)(c). In this instance, we accept the Koszarek's statement of the facts and issues as correct.

Koszarek first argues that the trial court erred when it requested a GAL to determine whether he should have been required to undergo a third psychological evaluation.[1] Koszarek and Minzner agreed to have a psychological evaluation prior to Koszarek's first appeal in this case.[2] On December 4, 2007, the trial court entered an order stating that there was insufficient evidence in Dr. Ed Conner's psychological evaluation to require Koszarek's parenting to be supervised, although Dr. Conner noted that Koszarek's answers to his evaluations were guarded. Dr. Peter Ganshirt also conducted a custody evaluation. The trial court, citing an agreement by the parties[3] and the fact that Dr. Conner stated that Koszarek gave guarded answers, ordered Koszarek to undergo a third psychological evaluation with Dr. Stuart Bassman. In doing so, the trial court

[1] We believe that Koszarek has conflated his first and second arguments to some degree. We consider the trial court's ability to appoint (and rely upon the testimony of) a GAL while addressing Koszarek's second argument

[2] It appears to this Court that this issue should be barred on *res judicata* grounds, because Koszarek did not include this issue in his first appeal to this Court. However, the appellees declined to file a brief in this matter. As we are cognizant of our Supreme Court's recent decisions concerning this Court's powers to raise issues *sua sponte*, we decline to address this issue now. *See Harrison v. Leach*, 323 S.W.3d 702, 709 (Ky. 2010).

[3] This agreement was apparently not included in the record. Regardless, we do not believe that it is dispositive concerning this issue.

considered the GAL's statement that it was her understanding that the parties agreed to undergo psychological evaluations under Dr. Bassman.

KRS 403.290(2) provides that a family court "may seek the advice of professional personnel, whether or not employed by the court on a regular basis. The advice given shall be in writing and made available by the court to counsel upon request." This provision was "'designed to permit the court to make custodial and visitation decisions as informally and non-contentiously as possible, based on as much relevant information as can be secured, while preserving a fair hearing for all interested parties.'" *Morgan v. Getter*, 441 S.W.3d 94, 104 (Ky. 2014) (quoting Uniform Marriage and Divorce Act (U.L.A.) § 404, comment (West Publishing Co. 1987)). Here, the trial court ordered Koszarek to undergo a third mental health evaluation in part because one previous mental health examiner stated that Koszarek gave "guarded" answers. Because the trial court is entitled to have the assistance of professional personnel under KRS 403.290(2), it stands to reason that the trial court should have the assistance of personnel who are able to make an accurate determination. "Since the family court is in the best position to evaluate the testimony and to weigh the evidence, an appellate court should not substitute its own opinion for that of the family court." *B.C. v. B.T.*, 182 S.W.3d 213, 219 (Ky. App. 2005)(footnote omitted). We find no error on behalf of the trial judge here.

Koszarek's next argument is that the final agreement in this case prevents the parties from engaging in any sort of alternate dispute resolution, or the

appointment of a GAL. "Waiver has generally been defined under Kentucky law as 'a voluntary and intentional surrender ... of a known right[.]'" *Am. Gen. Home Equity, Inc. v. Kestel*, 253 S.W.3d 543, 553–54 (Ky. 2008) (quoting *Conseco Fin. Servicing Corp. v. Wilder*, 47 S.W.3d 335, 344 (Ky. App. 2001)). "'A waiver may be express or implied, although waiver [of arbitration rights] will not be inferred lightly.'" *Id.* at 554 (quoting *Conseco*, 47 S.W.3d at 344). "Absent an ambiguity in the contract, the parties' intentions must be discerned from the four corners of the instrument without resort to extrinsic evidence." *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 385 (Ky. App. 2002)(citations omitted).

The agreement grants Koszarek and Minzner joint custody, and also provides as follows:

> In the event the parties disagree as to any of the foregoing, or if other decisions to be made concerning the parties' minor child arise that the parties cannot agree upon, the parties agree to consult with a third party to be agreed upon by the parties, the cost to be shared by the parties.

The contract in the present case also contains language stating that the agreement constitutes the entirety of the agreement between the parties.

We do not believe that this language waives any alternative dispute resolution. In fact, it is silent on the subject altogether; the agreed order merely states that the parties must *consult* with a third party. It does not state that the parties are in any way *prohibited* from engaging in any alternative dispute resolution. No rights have been relinquished under this language.

Koszarek argues that this language precludes the use of a GAL. We disagree because the GAL has no decision-making power in this case and seems to facially comport with the agreement's requirement that the parties "consult" with a third party.[4] Indeed, "A guardian *ad litem* (a guardian for the purposes of suit or litigation), is then, broadly, a person appointed by a court to appear on behalf of, to 'guard,' a minor (or other incompetent) in a lawsuit." *Morgan*, 441 S.W.3d at 106. KRS 26A.140(1) provides that "[c]ourts shall implement measures to accommodate the special needs of children which are not unduly burdensome to the rights of the defendant," including the appointment of a GAL. To be clear, KRS 26A.140 does not mandate the appointment of a GAL in every case; however, allowing parties to contractually agree to forbid the appointment of a GAL clearly impedes upon a trial court's ability to accommodate the needs of children when it is necessary to do so.

Even if we interpreted the language in the parties' agreement as preventing the appointment of a GAL as Koszarek suggests, any provision that prevented a court from complying with KRS 26A.140(1) would be void as against public policy. "Public policy will not permit a contract to bring about one result when a statute requires the opposite result." *S.J.L.S. v. T.L.S.*, 265 S.W.3d 804, 821 (Ky. App. 2008) (citing *State Farm Mut. Auto. Ins. Co. v. Fletcher*, 578 S.W.2d 41, 43 (Ky. 1979). Furthermore, we note that the opinion of a GAL, unlike

[4] We also note that it appears the parties agreed to the appointment of a GAL in a November 14, 2007 order.

alternative dispute resolution, is nonbinding. The trial court did not err in appointing a GAL, nor in considering statements made by the GAL.

Finally, Koszarek argues that the trial court erred because it found that he was not entitled to any recoupment of his child support. This Court's discussion of this issue during Koszarek's first appeal to this Court was as follows:

> [T]he plain language of the settlement agreement provides that Frederick agreed to waive his right to an amount or a claim to an amount paid for child support that would either balance or provide compensation to him by Margaret. The record indicates that during the initial mediation settlement, Frederick agreed to pay Margaret $901.52 per month in child support because at the time of the mediation, she had sole custody of the parties' daughter. Frederick states that the mediation agreement provided that once the family court ruled on the EPO in Indiana granting sole custody to Margaret, the court was to revisit the child support obligations. However, when the family court awarded him joint custody, the child support obligations were not revisited. Therefore, in the settlement agreement, Frederick claims he agreed to waive any right he may have had to seek an offset for the child support he paid from the time he was awarded joint custody. Frederick's explanation conforms to the plain language of the settlement agreement. Accordingly, the family court's interpretation that this provision acted to waive Frederick's right to at any time seek modification of his child support obligation on the basis of a shared parenting arrangement is not in accordance with the plain language of the settlement agreement, and is therefore erroneous. As a result, we must vacate this portion of the order, and remand this matter to the Campbell Family Court to address Frederick's motion to modify his child support on its merits.

Koszarek at 2.

Upon remand, Minzner stipulated that she had been overpaid child support above the 15% percent threshold necessary to establish a rebuttable presumption of a material change in circumstances under KRS 403.213(2). However, in *Clay v. Clay*, this court stated that "restitution or recoupment of excess child support is inappropriate unless there exists an accumulation of benefits not consumed for support." 707 S.W.2d 352, 354 (Ky. App. 1986). We have repeatedly reaffirmed this rule. *See*, *e.g.*, *Hempel v. Hempel*, 432 S.W.3d 730, 732–33 (Ky. App. 2014).

Koszarek argues that the trial court's order of August 16, 2013, erroneously denied him the right to recoupment. This is incorrect. That order allowed the parties to argue the issue at a later child support modification hearing. Furthermore, two orders contained in the record, one dated March 19, 2014, and the other dated May 23, 2014, allowed Koszarek to recover amounts he overpaid in child support from Minzner.

Conclusion

In sum, we hold that the trial court did not err when it required Koszarek to undergo an additional psychological evaluation because the trial court was empowered to do so under KRS 403.290(2). We also hold that the plain language in the parties' agreement in this case did not prohibit the trial court from directing the parties to participate in mediation or in appointing a GAL. Finally, the trial court did not deny Koszarek the ability to recoup child support payments from Minzner, there are two orders in the record allowing him to do just that.

The Campbell Family Court's order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Frederick Koszarek, *pro se*
Bellevue, Kentucky

BRIEF FOR APPELLEE:

No brief filed for appellee