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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-001571-MR
NO. 1997-CA-003292-MR

MICHAEL SWANGO — APPELLANT

v.

APPEALS FROM CAMPBELL CIRCUIT COURT
HONORABLE LEONARD L. KOPOWSKI, JUDGE
ACTION NO. 90-CI-00238

ROBBIN SWANGO FAIRBANK — APPELLEE

OPINION
AFFIRMING
* * * * * * * * * *

BEFORE: GUIDUGLI, JOHNSON, AND KNOPF, JUDGES.

KNOPF, JUDGE. Michael Swango (Swango) appeals two (2) orders of the Campbell Circuit Court. In 1997-CA-001571-MR, Swango appeals from an order granting his former wife Robbin Swango Fairbank (Fairbank) sole custody of their child. In 1997-CA-003292-MR, Swango appeals an order setting child support. After reviewing the record, the arguments of counsel, and the applicable law, we affirm both the custody and the child support decisions.

Swango and Fairbank married in 1986. They had one (1) child, Monica, born in 1987. The parties divorced in 1990, but continued to live together intermittently. Their separation agreement provided for joint custody. The child was to spend

equal time with each parent, with Swango paying Fairbank $30.00 per week in child support. In 1992, Fairbank agreed that Monica would primarily reside with Swango and began paying Swango child support. Both parties remarried.

In June 1995, Fairbank moved for sole custody. The domestic relations commissioner awarded Swango temporary custody and appointed a psychologist to perform a custodial evaluation. The commissioner held a custody hearing over four (4) days in January 1997. The commissioner recommended that Fairbank get sole custody. Swango filed objections. By order entered May 27, 1997, the court adopted the commissioner's report and recommendations.

Custody Issues

In awarding sole custody to Fairbank, the court modified the previous order of joint custody. The court found that Swango refused in bad faith to cooperate in the upbringing of the child by interfering with Monica's relationship with Fairbank. Swango did not appeal this ruling. The record supports the court's decision to decide custody de novo. Mennemeyer v. Mennemeyer, Ky. App., 887 S.W.2d 555, 558 (1994).

Swango first argues that the commissioner mistakenly relied on the findings of the court-appointed expert. We disagree.

In custody proceedings the court may seek the written advice of professional personnel. The advice shall be made available to counsel upon request, and counsel may examine any professional personnel consulted by the court. KRS 403.290(2).

A psychological professional's conclusions are evidence to be considered by the courts, not dictates. Chalupa v. Chalupa, Ky. App., 830 S.W.2d 391, 392 (1992). Courts cannot rely solely on the recommendations of psychologists. Reichle v. Reichle, Ky., 719 S.W.2d 442, 445 (1986).

The commissioner appointed Mark Kroger to perform a custodial evaluation. Kroger has a master's degree in counseling psychology and is certified by the Kentucky State Board of Psychological Examiners. The commissioner recognized him as an expert in child custody evaluations. Kroger submitted a report recommending that Fairbank be awarded sole custody. He found that Fairbank would do more to promote a relationship between Swango and Monica than Swango would do to promote a relationship between Fairbank and Monica.

Swango hired Dr. Peter Ganshirt to evaluate Kroger's methods and conclusions. Dr. Ganshirt criticized Kroger's record-keeping, evaluation techniques, and his recommendation to award custody to Fairbank. Swango's attorney cross-examined Kroger on these points. The commissioner found that the critical issue was Swango's interference with the relationship between Fairbank and Monica. The commissioner recommended, and the court ordered, that Fairbank receive sole custody.

We find no error. The commissioner heard four (4) days of testimony. There was evidence in the record, independent of Kroger's report, to support the commissioner's findings and conclusions. The commissioner did not rely solely on Kroger's recommendations. See Reichle, supra. Swango attacks Kroger's

credentials and methodology. KRS 403.290 does not set out any minimum qualifications for experts consulted by the court. The court was capable of giving Kroger's testimony the proper weight.

Swango next argues that the court's findings of fact are clearly erroneous. We disagree.

Findings of fact made by a domestic relations commissioner and adopted by the court shall not be set aside unless clearly erroneous. Kentucky Rule of Civil Procedure (CR) 52.01; Reichle, supra, at 444.

Swango devotes six (6) pages of his brief to this argument. However, we are hard-pressed to determine which factual findings he considers clearly erroneous. We will address the areas where Swango's view of the evidence conflicts with the court's conclusions. Swango suggests that Fairbank lacks parenting skills and only wants custody so that she will not have to pay child support. Swango also maintains that he promoted visitation and phone contact with Fairbank. He says the evidence shows Fairbank got more than her share of visitation.

We find no clear error. Reichle, supra. The Court found that both parties love their daughter. The Court did not make findings on the parties' respective parenting skills. However, there was no evidence that either party was unfit. Fairbank and Swango gave conflicting testimony about visitation. Fairbank testified that Swango unilaterally decided when she could visit Monica. Swango testified that he was cooperative and that it was Fairbank who was unreasonable. The court found that Swango was confrontational and controlling regarding visitation

and phone contact with Monica. Where there is conflicting testimony, we must give due regard to the opportunity of the trial court to judge the credibility of the witnesses. CR 52.01. The record supports the trial court's decision.

Swango next argues that the commissioner erred by limiting the custody hearing to events after 1992. He contends that the hearing was not truly de novo. We disagree.

When modifying a previous order of joint custody the court should decide custody anew, as if there had been no prior custody determination. Mennemeyer, supra, at 556; Benassi v. Havens, Ky. App., 710 S.W.2d 867, 869 (1986). "[A] trial court has the power to control the course of litigation, including control of the amount of evidence produced on a particular point. The overall fairness of a trial is within the sound discretion of the trial judge." Washington v. Goodman, Ky. App., 830 S.W.2d 398, 400 (1992) (citations omitted).

Swango attempted to introduce testimony about Fairbank's parenting skills while they were married and during their separation. The commissioner sustained Fairbank's objection. He ruled that only evidence arising after the parties divorced and agreed to joint custody was relevant. The court mistakenly referred to the dissolution decree as being dated March 1, 1992. The dissolution was entered in September, 1990. However, the court found that in 1992 the parties agreed to continue joint custody with Swango having primary residence.

We find no abuse of discretion. Washington, supra. Evidence from before 1992 had little relevance to the best interests of Monica in 1997.

Swango also complains that the commissioner denied him due process by limiting the presentation of his case. We disagree.

Again we must struggle to identify the errors of which Swango is complaining. Swango states that the commissioner did not permit him to question several "crucial witnesses": "Monica's school principal and teacher, a private investigator and property manager for Fairbank." The court denied Swango's request to have a psychologist who treated Monica, Dr. Peters, testify by conference call. Swango also alludes to evidence that he was not able to include in the January hearing "showing more of Fairbank's lact (sic) of responsibility in caring for her child." This evidence relates to child support, bills for Monica's treatment by Dr. Peters, and bills for family therapy. Swango argues "these issues were crucial in understanding Fairbank's true motivations and selfishness for money over her daughter."

The court did not abuse its discretion. Washington, supra. Swango does not explain what the first group of witnesses had to say that was "crucial." He successfully introduced a report prepared by Dr. Peters and testimony about Fairbank's finances. We fail to see how disputed bills for psychological treatment and family therapy would have persuaded the court to grant custody to Swango. Swango has not shown that the commissioner prejudiced his case.

Child Support Issues

When the court decided custody, it ordered the parties to exchange information regarding child support. The commissioner held a hearing on this issue in September 1997. He recommended that Swango be ordered to pay $168.72 per month in child support. He also recommended denying Swango's motions for back child support and for reimbursement of certain expenses. Swango filed objections. By order entered January 8, 1998, the court overruled the objections and adopted the commissioner's report and recommendations.

Swango argues that the court erred by failing to order Fairbank to pay child support for periods when the child lived with him, erred by failing to order Fairbank to pay a portion of a psychologist bill and a counseling bill, and erred by miscalculating Swango's future child support.

Swango first argues that the court should have found that Fairbank owed Swango child support for the period September 4, 1992 to May 3, 1995. The court found that the parties had an oral agreement that Fairbank would pay Swango $30.00 per week in child support during this period. Swango alleges that at the time of the agreement he was unaware of Fairbank's true income, and that he was under "mental, economical, and physical distress."

A court will enforce an oral child support agreement between parents if (1) it is proven with reasonable certainty, (2) it is "fair and equitable under the circumstances," and (3) the "modification might reasonably have been granted, had a

proper motion to modify been brought." Price v. Price, Ky., 912 S.W.2d 44, 46 (1995) (quoting Whicker v. Whicker, Ky. App., 711 S.W.2d 857, 859 (1986)). On the other hand, "child support may be modified only as to installments accruing subsequent to the filing of the motion for modification and only upon a showing of a material change in circumstances that is substantial and continuing." KRS 403.213(1).

The 1990 separation agreement called for Swango to pay Fairbank $30.00 per week in child support. By oral agreement, the parties reversed the obligation when Monica began residing with Swango in 1992. In June 1995, although the child was living with Swango, Fairbank moved for an order awarding her back child support based on the 1990 separation agreement. The commissioner found that the parties' 1992 modification was not unconscionable and that Swango did not owe Fairbank arrearage. Fairbank filed exceptions. Swango responded, asserting that the commissioner's report should be adopted in full.

In 1997, the circuit court held that Swango was not entitled to any support for the period September 4, 1992 to May 3, 1995 because the parties had not modified the 1992 agreement and Swango had not moved to modify support.

We find no abuse of discretion. Unlike Price, supra, Swango does not want the 1992 oral agreement enforced. Instead, he wants it set aside because it was unfair. However, he failed to request an increase in child support while Monica lived with him. He also failed to object when the commissioner approved the

agreement in 1995. The time for Swango to challenge the child support agreement has passed.

Swango next argues that the court erred when it did not award him any additional child support for the period May 3, 1995 through July 31, 1995. We disagree.

The court granted Swango temporary custody in June 1995. It did not order child support because the parties did not present evidence on that issue. Swango, through counsel, executed an agreed order entered September 27, 1995. That order set child support at $416.00 per month. It also recited: "[t]hat the current child support arrearage of $832.00 shall be paid in monthly payments of $208.00 until satisfied."

Swango contends that the agreed order only addressed the arrearage for the two (2) months preceding the entry of the order, August and September. He wanted the circuit court to find additional arrearage of $104.00 per month for May through July 1995. The agreed order states that the arrearage as of September 27, 1995, was $832.00. If he wanted arrearage for May through July, he should have included that in the agreed order.

Swango next argues that the court erred by refusing to order Fairbank to pay psychological and family therapy expenses. We disagree.

The psychologist bill arose when Monica visited Swango's sister, Beverly Karlson, in Florida in the summer of 1995. Before the visit, Fairbank authorized Karlson in writing to seek necessary medical treatment for Monica. Without

notifying Fairbank, Karlson took Monica to Dr. Ruth Peters because Monica intentionally banged her head.

The family therapy bill was for counseling ordered by the commissioner. Swango's therapist suggested that Fairbank and Monica attend some counseling sessions with Swango. They did so, and Fairbank also went to her own counselor.

The only relevant order in effect at the time of the disputed charges was the separation agreement. In it, the parties agreed to share extraordinary medical expenses and to consult with each other on matters concerning the child's health.

The circuit court found that the psychological treatment was not authorized medical treatment consented to by Fairbank, and that the parties should be responsible for their own counseling expenses. We find no clear error. As defined by statute, "extraordinary medical expenses" include costs reasonably necessary for medical services and for professional counseling or psychiatric therapy for diagnosed medical disorders. KRS 403.211(8). However, the parties had an agreement. The evidence supports the court's finding that Fairbank did not authorize or consent to Monica being treated by Dr. Peters.

As for the counseling expenses, the custody order did not state who should pay for it. The court did not err by requiring the parties to pay for their own counseling.

Swango next complains that the court calculated child support incorrectly. He first argues that the court should have

included a bonus as part of Fairbank's gross income. We agree, but find the error harmless.

Gross income for child support purposes means actual gross income from any source, including bonuses. KRS 403.212(2)(b). Fairbank's employer paid her a bonus of $3,743.96 for 1996, ten (10%) percent of her annual salary. Fairbank testified that her employer gave her a bonus most years, based on profits. On cross-examination, she agreed that she had always received a bonus. The court found that "it would be speculation as to whether Petitioner will receive a bonus for 1997." The court did not include any bonus in calculating child support.

The court erred by not including Fairbank's bonus as part of the couple's gross income. Although her bonus was not a certainty, she testified that she had received it every year. However, increasing the combined parental income by including Fairbank's bonus for 1996 would not have changed Swango's support obligation. Each parent's child support obligation is a function of their percentage of the combined parental income multiplied by the amount in the guideline table. KRS 403.212(3). Using the income figures in the record and the table in KRS 403.212, we find that reducing Swango's share of a higher guideline amount results in the same monthly payments for him. The error was harmless.

Swango's final child support argument is that the court did not properly account for his preexisting child support obligations. We disagree.

To establish combined adjusted parental gross income, the court deducts payments, to the extent made, for the support of prior-born children who are not the subject of the proceeding. KRS 403.212(2)(g)4. Swango's child support obligation to his first wife included current and past support. The circuit court adjusted the parties' combined gross income by subtracting only Swango's current support due, not the arrearage.

We find no error. If Swango had not fallen behind on his child support payments to his first wife, he would not have had to pay an arrearage. His child support obligation to Monica should not be reduced because of his failure to support his prior-born children. The court applied the statute correctly.

Finally, Swango broadly charges that the court violated his civil rights and his right to equality without discrimination. He requests that the case be removed from Campbell County to Boone County because of the court's gender bias against him. We disagree.

The court awarded custody to Swango's former wife, declined to award him child support for years during which he never requested it, and calculated child support based on the parties' current income and the law. We are affirming each of these decisions. Thus, we cannot find that the court discriminated against Swango by ruling against him.

For the foregoing reasons, the judgments of the Campbell Circuit Court are affirmed.

GUIDUGLI, JUDGE, CONCURS.

JOHNSON, JUDGE, CONCURS IN PART, DISSENTS IN PART AND FILES A SEPARATE OPINION.

JOHNSON, JUDGE, CONCURRING IN PART AND DISSENTING IN PART. I concur with the Majority Opinion in affirming the trial court in both appeals. However, I respectfully dissent in part because I would sua sponte order the Honorable Sally J. Herald, counsel for appellant Michael Swango, to show cause why she should not be sanctioned for her failure to comply with Kentucky Rules of Civil Procedure (CR) 76.12(4)(a) and 7.02(4), which require typewritten briefs to be in "type no smaller than 12 point." It is difficult to determine the type size of counsel's brief, but suffice it to say that this judge had to have the appellant's briefs enlarged by the copy machine in order to read them. I would assess a fine of $200.00 to be paid by attorney Hearld unless good cause were shown. CR 73.02(2)(c).

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