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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001459-MR

RUSSELL J. HENNING APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE PATRICIA WALKER-FITZGERALD, JUDGE
ACTION NO. 90-CI-007110

RHONDA ANNE HENNING APPELLEE

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

BEFORE: BUCKINGHAM, KNOPF, and SCHRODER, Judges.

BUCKINGHAM, JUDGE. This is a domestic relations matter wherein Russell Henning appeals from a decision of the Jefferson Family Court ordering that he pay 62% of all work-related child care expenses resulting from the after-school care of his two minor children. We conclude the trial court did not abuse its discretion, and we therefore affirm.

The marriage of Russell and Rhonda Anne Henning was dissolved by order entered October 14, 1991. Incorporated

therein was their previously executed settlement agreement which provided that Rhonda receive sole custody of the parties' two minor children, Annie, born February 25, 1982, and Maggie, born June 30, 1987.

In January 1997, Rhonda filed a petition seeking an order requiring Russell to pay his share of work-related child care costs she incurs due to her employment. These costs are principally derived from the costs associated with the substantial care required by Annie, who is confined to a wheelchair due to cerebral palsy. The parties conceded the base amount of child support conformed with the child support guidelines.

The matter was heard by a domestic relations commissioner who, on May 22, 1997, entered her report determining that the child care costs were more akin to "disability-related" expenses rather than "work-related" expenses. The commissioner therefore held that the costs should be borne by a guardianship account set up for Annie's benefit rather than by Russell. Rhonda filed exceptions thereto, and on May 21, 1999, the court rendered its opinion and ordered that Russell be responsible for his share of the work-related child care costs.[1] This appeal ensued.

[1] The proportionate amounts are derived from the respective proportions of the parties' combined adjusted gross incomes; i.e., 62% is borne by Russell and the remainder by Rhonda.

Russell raises the same arguments before this Court as those presented before the lower court. The essence of his reasoning remains that the funds received on Annie's behalf through the settlement agreement of a medical malpractice action provide ample independent financial resources from which her additional care requirements can be satisfied.[2] Russell contends that but for Annie's disability she would not require the after-school "sitters" and, as such, this expense is of a nature that is more suitably payable by the guardianship account. He bases his argument on the provisions of KRS 403.211 delineating the extraordinary circumstances wherein the court may deviate from the statutory child support guidelines. Specifically, Russell relies on the following subsections:

> (3) A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case shall be sufficient to rebut the presumption and allow for an appropriate adjustment of the guideline award if based upon one (1) or more of the following criteria:
>
> . . . .
>
> (d) The independent financial resources, if any, of the child or children;
>
> . . . .

[2] The record reflects receipt of $431,422.10 on Annie's behalf in September 1992 from the proceeds of a medical malpractice action. The funds are held in a guardianship account of which Rhonda is the guardian, and the fund apparently held more than $500,000 at the time this matter was before the trial court.

> (g) Any similar factor of an extraordinary nature specifically identified by the court which would make application of the guidelines inappropriate.

KRS 403.211(3)(d) and (g). Russell contends the case of Rainwater v. Williams, Ky. App., 930 S.W.2d 405 (1996), supports his position that these statutory considerations control this case. We disagree.

In Rainwater, the lower court denied Joe Rainwater's motion to either reduce or vacate his child support of $85.00 per month, following his son's receipt of approximately $13 million in an award resulting from a products liability lawsuit. On appeal, this court held that the trial court abused its discretion by failing to consider any evidence as to whether extraordinary circumstances, including those contained in KRS 430.211(3), existed to justify a deviation from the child support guidelines. Id. at 408. Specifically, the lower court refused to hear any proof of the child's independent financial resources.[3] Id.

Such is not the case herein. Here, the issue before the court was not modification or deviation from the child support guidelines. Rather, the court was addressing the appropriate source from which Annie's work-related child care

[3]Prior to the child in Rainwater reaching the age of majority, he was to receive $5,000 per month from 1994-1997, $6,000 per month from 1997-2000, and $7,500 per month from 2000-2004, in addition to lump-sum payments during that time of $50,000 on November 1, 1997, and $75,000 on November 2, 2000. Rainwater, 930 S.W.2d at 406.

costs should be derived; i.e., the guardianship account or her parents.

KRS 403.212 defines income and other sums generally associated with child support and further sets forth the statutory guidelines regarding the amount of child support required, given the parties' combined adjusted gross monthly income. In tandem therewith, KRS 403.211(3) addresses some of the extraordinary factors to be considered by the court in ordering a deviation from the guidelines in KRS 403.211(2). KRS 403.211(3), however, does not list factors to be considered in the assignment of "child care" costs. Rather, KRS 403.211(6) sets forth that

> [t]he court shall allocate between the parents, in proportion to their adjusted gross income, reasonable and necessary child care costs incurred due to employment, job search, or education leading to employment, in addition to the amount ordered under the child support guidelines.

Id.(emphasis added).

There is no dispute that Annie's "sitter" costs are incurred while Rhonda is working. Russell's reliance upon KRS 403.211(3) and our opinion in Rainwater as grounds for absolving him from his proportionate share of the work-related child care expenses is therefore misplaced. Rather, the court was under neither the obligation nor the duty to consider Annie's independent financial resources in allocating the payment of her child care costs. Moreover, KRS 387.065(6) instructs that "[a] guardian shall not provide for the support, care, or education of

a ward which a parent of the ward is legally obligated and financially able to provide." The record reflects that Russell is capable of providing his proportionate share of Annie's requisite support and care.

With regard to the support and maintenance of children, the trial court retains broad discretion, provided it operates within the confines of the statutory parameters. See Van Meter v. Smith, Ky. App., 14 S.W.3d 569, 572 (2000). We conclude that, with respect to the instant matter, the trial court carefully enunciated its consideration of the parties' financial abilities, in addition to the independent resources available to Annie, albeit it was under no statutory directive to do so. In finding Annie's disability would require that she receive life-long assistance and the guardianship account's resources were not that substantial in view of this fact, we believe the trial court's discretion was properly exercised in rendering its order.

In accordance with the foregoing discussion, the order of the Jefferson Family Court is affirmed.

KNOPF, JUDGE, CONCURS.

SCHRODER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

SCHRODER, JUDGE, DISSENTING. I believe that portion of the work-related child care costs which are attributed to the disability of Annie should be paid out of the disability-related settlement. The settlement was for damages for extra medicals, etc. I agree that Rainwater v. Williams, Ky. App., 930 S.W.2d 405 (1996) is applicable. Any modification of Russell's child

support necessarily effects the source for the balance of Annie's work-related child care costs. I believe the majority opinion is making a distinction without a difference. I would vacate and remand to consider using some of the guardianship account.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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