

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-002803-MR  
& 1999-CA-003090-MR

NICK A COOLEY

APPELLANT/CROSS-APPELLEE

v. APPEAL AND CROSS-APPEAL FROM HARLAN CIRCUIT COURT  
HONORABLE RON JOHNSON, JUDGE  
ACTION NO. 97-CI-00202

VIRGINIA ANN (RIDDLE) COOLEY

APPELLEE/CROSS-APPELLANT

OPINION AND ORDER  
1. AFFIRMING;  
2. IMPOSING SANCTIONS  
FOR A FRIVOLOUS APPEAL;  
3. DISMISSING CROSS-APPEAL  
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BEFORE: CHIEF JUDGE GUDGEL; EMBERTON AND KNOPF, JUDGES.

KNOPF, JUDGE: Nick A. Cooley appeals from a post-decree order of the Harlan Circuit Court ordering him to pay post-secondary and related educational expenses incurred by his children. We agree with the trial court that Nick has waived any objection to payment of these expenses through his prior representations to the trial court. We further find that this appeal is patently without merit, appearing to have been brought in bad faith. Accordingly, we shall direct Nick to pay the attorney's fees and costs incurred by the appellee, Virginia Ann Riddle Cooley (Ann),

in responding to this appeal. Lastly, we shall grant Ann's motion to dismiss her cross-appeal.

Nick and Ann were married on August 18, 1979. Three children were born of the marriage. On August 17, 1990, Nick filed a petition in the Wayne Circuit Court to dissolve the marriage. Due to several judicial disqualifications, the matter was ultimately heard in the Harlan Circuit Court. In March of 1998, the trial court entered its final judgment resolving all outstanding issues.<sup>1</sup> In pertinent part, the parties were given joint custody of the children, with Ann designated as the residential custodian. The court also made permanent its prior orders regarding Nick's visitation with the children. After considering Nick's substantial income above the child-support-guidelines chart, as well as the needs of the children, the trial court set child support in the amount of \$5,000.00 per month.

Thereafter, the parties elder two children, Stewart and Lindsey, completed high school. Stewart enrolled at Somerset Community College, and Lindsey enrolled at the University of Kentucky. Ann filed a motion with the trial court to require Nick to pay their college expenses. After reviewing the record, the trial court concluded that Nick had previously represented to Ann and to the court that he would be responsible for paying those expenses. Consequently, by an order entered on September

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<sup>1</sup> In a prior appeal and cross-appeal from this order, another panel of this Court affirmed in part, reversed in part and remanded. Nos. 1998-CA-001210-MR & 1998-CA-001211-MR (Not-To-Be-Published opinion rendered September 15, 2000). Nick and Ann each filed motions for discretionary review. The Supreme Court of Kentucky denied both motions on March 13, 2002. No. 2001-SC-000048.

23, 1999, the trial court directed Nick to pay his children's post-secondary educational expenses. The trial court also reduced Nick's monthly child support obligation to \$3,000.00 based upon Stewart and Lindsey attaining the age of majority.

On appeal, Nick correctly notes that ordinarily support of a child terminates when he or she reaches the age of 18, unless the child is a high school student.<sup>2</sup> Nick argues that the trial court erred in requiring him to pay the children's college expenses in the absence of a written agreement. Rather, he argues that the payment of these expenses is a matter which must be left for the children and their parents to resolve on their own. He also denies that he made any oral stipulation to the trial court unequivocally promising to pay these expenses.

The trial court found that Nick had repeatedly represented to the court that the children's college and related educational and living expenses would be paid by a trust which his parents had established. We have reviewed the record and conclude that the trial court's findings are supported by substantial evidence. During a hearing on June 10, 1996, Nick's counsel assured the court that there were more than adequate funds in the trust to provide for the children's college expenses. Counsel further stated that if there were not adequate funds, then Nick would be responsible for paying those expenses. The trial court's order of July 8, 1996, clearly reflects this understanding. Nick never attempted to dispute these

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<sup>2</sup> KRS 403.213(3).

representations by his counsel until Ann filed her motion to require him to pay the children's college expenses.

Furthermore, Nick admitted that he told the court that the issue of college expenses of the children need not be the subject matter of a formal order because the trust would provide for these expenses. On other occasions, Nick's counsel assured the trial court that Nick intended to pay the children's college expenses. During a hearing on October 18, 1999, Nick's counsel told the court that he had reviewed the video tape of the June 10, 1996, hearing. Counsel admitted that there were representations made at that prior hearing to the effect that Nick would be responsible for payment of the children's college expenses in the event that the trust would not pay. Counsel stated that he could not argue in good faith that Nick was not bound by these representations. Having led the trial court to believe that he or the trust would pay the children's college expenses, Nick will not now be heard to complain that there was no written agreement requiring him to do so.

Ann also argues that this Court should impose sanctions on Nick for filing a frivolous appeal. Under CR 73.02(4), if an appellate court determines that an appeal or motion is frivolous, it may award just damages and single or double costs to the appellee or respondent. An appeal or motion is frivolous if the court finds that it is so totally lacking in merit that it appears to have been taken in bad faith.<sup>3</sup> Ann contends that Nick's prior representations to the trial court that these

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<sup>3</sup> See also Leasor v. Redmon, Ky., 734 S.W.2d 462, 464 (1987).

expenses would be paid belie his current assertion that he never agreed to do so, and demonstrate that this appeal is patently without merit.

The initial dispute over payment of college expenses could be attributed to a good-faith misunderstanding by Nick of his prior representations to the trial court. Apparently, Nick did not know in 1996 that the trust would not pay for the children's college educations if the parents were able to do so. In his defense, Nick also told the trial court that he did not understand his counsel's representations in 1996 as an unequivocal promise to pay for his children's college expenses. The trial court expressed irritation at Nick's explanation and untimely objection to payment of the college expenses, and it awarded attorney's fees to Ann for the costs of bringing her motion for payment of the college expenses.

In any event, we find no merit to this appeal. The record clearly establishes that Nick agreed to be responsible for these expenses. His counsel subsequently admitted to the trial court that Nick had stipulated to this obligation in June of 1996.<sup>4</sup> Sanctions are clearly appropriate where a party has

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<sup>4</sup>After the trial court entered its order of September 23, 1999, Nick filed a motion to alter, amend or vacate that order pursuant to CR 59.05. Among other issues, Nick argued that he had never made an express stipulation to the court in 1996 that he would pay the children's college expenses. The motion came before the trial court for a hearing on October 18, 1999. Neither Nick nor Ann were present at the hearing, but their respective counsel were present. Near the beginning of the hearing, the following exchange took place between Nick's counsel and the trial court:

Court: The record will reflect that appearing in this matter is counsel for the petitioner, the Honorable Gordon Dill, and counsel for the respondent, the Honorable Susan Lawson. This is here on a motion to alter, amend or vacate filed by Mr. Dill on behalf of the petitioner [Nick].

(continued...)

previously conceded that the issue raised on appeal is without merit.<sup>5</sup> Considering the circumstances of this case, we believe it is appropriate to impose sanctions pursuant to CR 73.02(4).

Finally, Ann moves to dismiss her cross-appeal from the trial court's denial of her motion to require Nick to pay the children's transportation and out-of-pocket expenses while at college. As Nick has no objection, the motion shall be granted. However, Ann shall not recover from Nick any legal expenses which are attributable to her cross-appeal.

Accordingly, the judgment of the Harlan Circuit Court is affirmed.

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<sup>4</sup>(...continued)

You may bring on your motion, Mr. Dill.

Mr. Dill: Thank you your honor. Your honor, I have raised several matters. First in order of [sic] paragraph one of our motion, relating to college expense. At this time I must advise the court that subsequent to filing the motion as late as this morning, I have reviewed some specific citations to the tape record that Ms. Lawson has provided to me. And at this point, I find that there were representations made on the record by me in the presence of Mr. Cooley to cause me not to be able to go forward with that motion. I would withdraw it except that my client is not here to consent to that. So, I suppose what I'm saying is if he were here I would recommend that he withdraw it. In lieu of that I cannot advance that part of the motion. And I suppose that it should be overruled.

Court: The a.....

Mr. Dill: What I mean to say, basically, is if I had my client's authority I would withdraw it. I did not see the tape until about 10:00 a.m. this morning, consequently, have not had that opportunity.

Court: Which tape was that? The one on the 13<sup>th</sup> of September?

Mr. Dill: No, the one of... I believe it was July 30<sup>th</sup> of 1996. [sic]

Court: Right, Right.

Mr. Dill: Ms. Dawahare was counsel [for Ann] at that time.

Court: So you're referring to the original tape?

Mr. Dill: Yes your honor.

Court: I certainly recall that. And the motion for that respect and for that ground is overruled. Tape No. 99-00-26-VCR-094; 10:39:04 - 10:41:05

<sup>5</sup> Angel v. Harlan County Board of Education, Ky. App., 14 S.W.3d 559, 562 (2000).

It is hereby ordered and adjudged that Nick A. Cooley is hereby assessed all court costs associated with this appeal from its beginning until its conclusion, and Virginia Ann Cooley shall be entitled to recover her reasonable costs and expenses incurred in this litigation, including a reasonable fee for her attorney, with the exception of attorney's fees and costs which are attributable to her cross-appeal.

Ann shall have fifteen (15) days from the date of entry of this Opinion and Order in which to file with the Clerk of this Court (with copy to Nick) her statement of costs, expenses, and fees (the attorney need not be made a party), together with a supporting affidavit or affidavits. Nick shall thereafter have fifteen (15) days to respond. This Court shall thereafter fix the amount which Ann shall recover, and such determination shall be made on the basis of the record, unless otherwise ordered for hearing by this Court.

Following a fixing of the sanction, this case shall be remanded to the Harlan Circuit Court for enforcement of the trial court's orders, for collection of all costs, and for collection of the sanction.

It is further ordered and adjudged that the cross-appeal filed by Virginia Ann Cooley, No. 99-CA-003090-MR is dismissed.

ALL CONCUR.

ENTERED: May 3, 2002

/s/ William L. Knopf  
Judge, Court of Appeals

BRIEF FOR APPELLANT/CROSS-  
APPELLEE:

Gordon J. Dill  
Ashland, Kentucky

BRIEF FOR APPELLEE/CROSS-  
APPELLANT:

Susan C. Lawson  
Lawson & Lawson, PSC  
Harlan, Kentucky