

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000894-MR

ROBERT W. COLE

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 94-CI-00880

BARBARA J. COLE (NOW RAMBO)

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: BARBER, McANULTY, SCHRODER, JUDGES.

McANULTY, JUDGE: Robert W. Cole (Robert) appeals from an order of the Kenton Circuit Court requiring him to reimburse his former wife, Barbara J. Cole,¹ (Barbara) for the extraordinary educational expenses associated with sending their oldest child, Robert Cole, III (Rob), to a private parochial high school. We affirm.

The parties were married November 9, 1984, and had three children during their marriage. The oldest child, Rob, was born April 22, 1985. On May 31, 1994, Barbara filed a petition

¹Now Barbara J. Rambo.

to dissolve the marriage. The divorce decree was entered on May 9, 1995, and incorporated a separation agreement dated June 17, 1994. The agreement gave the parties joint custody of the children, with Barbara designated as the primary residential custodian. After the decree was entered, various litigation involving child support ensued. On June 15, 1998, the parties entered into an agreed order which, pursuant to the child support guidelines, set child support at \$268.00 per week during the school-year period of September 1 to June 1. During the summer months, in a deviation from the child support guidelines, support was set at \$359.00 per week.

On September 21, 2000, Barbara filed a motion to modify child support. Following a hearing, on April 4, 2001, the circuit court entered an order ruling on the motion. The order determined that a modification of child support was not justified based solely upon changes in the earnings capacities of the parties because the changes in earnings produced less than a 15 percent increase in the amount due per month under the child support guidelines. See KRS² 403.213(2).³

However, the circuit court further determined that Rob had been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and depression, and that his interest would be best served by attending a private parochial school, LaSalle High School, rather than the local public high school, Colerain High School.

²Kentucky Revised Statutes.

³Changes in the parties' earnings produced an increase in child support of \$268.00 per week to \$294.00 per week, an increase of 9.7 percent.

The order required Robert to reimburse Barbara for the expenses associated with attending the private school in proportion to Robert's percentage of the parties' total income.⁴ This appeal followed.

First, Robert argues that the relief granted by the circuit court, the granting of extraordinary education expenses, was not properly before the court. This argument is based upon Robert's interpretation of the circuit court's determination that "the indicated amount of child support does not represent a 15% increase so as to allow modification based solely upon the increase in the earning capacities. KRS 403.213(2)." Robert argues that though the circuit made a determination that a modification was not permitted based solely on changes in earning capacities, "[t]he trial court then mysteriously sustained a non-existent motion," and that "[t]he record is devoid of [Barbara] making such a request." We disagree.

In Barbara's affidavit filed in conjunction with her September 21, 2000, motion to modify child support, as her basis for modifying support, Barbara stated,

In addition to the normal material changes which occur due to the children increasing in size and age, Petitioner's income has increased, Respondent's income has increased, Petitioner has incurred extraordinary educational expenses for Robert Cole, III, (one of the minor children of the parties), and Respondent has chosen for approximately the past two and one-half years (almost three years) not to exercise his visitation rights

⁴It appears that the private school expenses consist of \$4,800.00 per year for school tuition and \$93.00 per month for school bus transportation expense. Robert's proportional share of the expense is 64 percent.

thereby decreasing his normal living expenses and increasing Petitioner's normal living expenses. (Emphasis added.)

Further, in her answers to questions twenty and twenty-one of "Petitioner's Answers to Interrogatories" filed on November 21, 2000, Barbara identified Rob's "disability/illness" as a basis for requesting an increase in child support. In addition, Tim B. Klett, a family and adolescent therapist, provided deposition testimony on the issue of Rob's educational circumstances and his need to attend a private school. Further, at the March 21, 2001, evidentiary hearing, the majority of the testimony and evidence concerned the educational issue. Finally, substantially all of Robert's March 21, 2001, "Memorandum in Opposition to Petitioner's Motion to Modify Child Support" was devoted to discussing the educational issue.

The litigation surrounding Barbara's motion to modify child support was dominated by the issue of Rob's alleged extraordinary educational needs and Barbara's request to be reimbursed for the corresponding expense. The record discloses that Barbara was requesting reimbursement for these expenses, that Robert was on notice of this request, and the issue was properly before the circuit court. In summary, Robert's interpretation of the circuit court's order is untenable.

Robert also argues that the circuit court erred in its conclusion that Rob suffers from ADHD and that he would benefit from private education schooling. Again, we disagree.

In order to modify child support, KRS 403.213(1) requires "a showing of a material change in circumstances that is

substantial and continuing." A motion to modify which results in less than a 15 percent change in the amount of support due per month is, rebuttably, not a material change in circumstances. KRS 403.213(2). However, a finding by the circuit court that the application of the guidelines would be unjust or inappropriate in a particular case is sufficient to rebut the presumption and allow for an appropriate adjustment of the guideline award if based upon, among other things, a child's extraordinary educational needs. KRS 403.211(3). The meaning of the word "extraordinary" is to be determined by the circuit court in its discretion. KRS 403.211(4).

Any deviation from the guidelines must be accompanied by the circuit court's findings specifying the reason for the deviation. KRS 403.211(2). Deviation from the guidelines is allowed on a motion for modification. See Redmon v. Redmon, Ky. App., 823 S.W.2d 463 (1992) (Deviation based upon incarceration of obligor); Rainwater v. Williams, Ky. App., 930 S.W.2d 405, 407 (1996) (Deviation based upon financial resources of child). A decision on whether to deviate from the guidelines is within the trial court's discretion. Rainwater at 407. "As long as the trial court's decision comports with the guidelines, or any deviation is adequately justified in writing, this Court will not disturb the trial court's ruling in this regard." Marshall v. Marshall, Ky. App. 15 S.W.3d 396, 400-401 (2000). A judgment concerning child support will not be disturbed "unless there has been a clear and flagrant abuse of the powers vested in that court." Bradley v. Bradley, Ky., 473 S.W.2d 117, 118 (1971).

The circuit court made the following findings regarding Rob's educational circumstances and his extraordinary educational needs:

5. [T]he minor child, [Rob], is currently enrolled as a sophomore at LaSalle High School, a private parochial institution. The Petitioner enrolled [Rob] at LaSalle due to his need for smaller classrooms and more individual attention. [Rob] has been diagnosed with ADHD and depression. He has had behavior problems in the past which affected his performance when enrolled in the local public schools in Ohio. Since his enrollment at LaSalle High School, [Rob] has done well in school, although he still continues to have periodic behavior issues.

The Court finds that the Petitioner's decision to enroll [Rob] at LaSalle was motivated solely by her desire to have him placed in a school that will best meet his educational needs. Indeed, the Petitioner has enrolled the other two children of the parties in public schools where she resides. The Court finds that [Rob] has extraordinary educational needs which are being best served by his attending LaSalle High School, rather than Colerain High School. KRS 403.211(3)(b)

7. Based upon the foregoing facts, the Court finds that strict application of the Child Support Guidelines would be unjust or inappropriate.

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." CR⁵ 52.01. Findings of fact are not clearly erroneous if supported by substantial evidence. Janakakis-Kostun v. Janakakis, Ky. App. 6 S.W.3d 843, 851 (1999). The test for substantiality of evidence is whether when taken alone, or in the light of all the

⁵Kentucky Rules of Civil Procedure.

evidence, it has sufficient probative value to induce conviction in the minds of reasonable men. Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298, 308 (1972).

The circuit court's findings that Rob has been diagnosed with ADHD and depression, that he had behavioral problems when enrolled in the public schools, and that his extraordinary educational needs would be best served by attending a private school are supported by substantial evidence.

Included in the record is the deposition testimony of Tim B. Klett taken on December 11, 2000. Klett is engaged in family and adolescent therapy at Children's Hospital Medical Center in Cincinnati, Ohio. Klett has a bachelor's degree in psychology, a master's degree in social work, is a licensed independent social worker, and has completed a two-year internship in clinical therapy. Klett began counseling Rob in March 1999, and had been counseling him for approximately one-year and nine-months at the time of the deposition. Exhibit 2 of Klett's deposition testimony states, in part, as follows:

[Rob] has been in treatment at Children's Hospital Medical Center, Dept. Of Psychiatry, since 3/24/99. He is presently diagnosed with Attention Deficit-Hyperactivity Disorder - the combined type and Cyclothymic Disorder, a type of mood disorder with periods of depression alternating with hypomanic symptoms including grandiosity, agitation, and excessive energy.

[Rob's] course of treatment has focused mostly on his school problems - academic, behavioral, and social/peer, secondary to his ADHD and Cyclothymia. Upon transfer to LaSalle HS from Colerain, there was significant improvement in academic and social functioning. The increased structure, individual atten., and smaller classrooms

increases [Rob's] performance dramatically, also lessening his emotional lability [sic] and depressive symptoms. The short class periods at LaSalle and the ability to bring his backpack to each class (i.e., individualized educational options) have specifically helped to meet [Rob's] spcial [sic] needs.

As it was at the time of this transfer, and is still presently, I recommend [Rob] continue to attend LaSalle in order to meet his special needs academically. [Rob's] level of attention, easy distraction, minimal ability to complete work independently, and need for smaller, more structured classes necessitate him attending a school that will met [sic] these special needs. He continues to struggle academically and emotionally, but at a manageable level of functioning. These facts indicate that this recommendation should be taken seriously.

In his deposition testimony, Klett explained that his conclusion that Rob was suffering from ADHD and depression was based upon his review of Rob's case history as reflected in the records of other Doctors who have evaluated Rob, and based upon his own professional experience. Further, based upon his training and experience as a family and adolescent therapist and his treatment and counseling of Rob, it would appear that Klett possesses the necessary credentials to make a competent professional recommendation regarding whether Rob has extraordinary educational needs and whether those needs may be met by attendance at LaSalle High School.

We are persuaded that Klett's testimony and exhibits are sufficient to support the circuit court's findings that Rob has extraordinary educational needs and that strict application of the child support guidelines would be unjust or inappropriate. While we recognize Robert's concern that Klett is not a medically

trained psychiatrist and is not trained to administer independent diagnostic tests, nevertheless, this concern goes to the weight of the testimony, and the trial court was in the better position to evaluate the credibility of Klett's testimony. CR 52.01; Chalupa v. Chalupa, Ky. App. 830 S.W.2d 391, 393 (1992).

In summary, the record in this case does not show that the circuit court's findings of fact were clearly erroneous, or that it abused its discretion in deviating from the child support guidelines and setting Robert's child support obligation to include a contribution to the extraordinary educational requirements of Rob.

For the foregoing reasons the judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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