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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000401-MR
AND
CROSS-APPEAL NO. 2004-CA-000640-MR

JAMES WILLIAM BOSLER, III — APPELLANT/CROSS-APPELLEE

APPEALS FROM JEFFERSON FAMILY COURT
v. HONORABLE JOAN L. BYER, JUDGE
ACTION NO. 02-CI-500563

ADELAIDE COURTNEY CROMWELL-BOSLER;
AND ROBERT G. STALLINGS, ATTORNEY
FOR PETITIONER — APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING IN PART AND REVERSING IN PART AND REMANDING WITH DIRECTIONS APPEAL NO. 2004-CA-000401-MR
AFFIRMING CROSS-APPEAL NO. 2004-CA-000640-MR

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BEFORE: BARBER, MINTON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: James William Bosler, III brings Appeal No. 2004-CA-000401-MR from the Findings of Fact, Conclusions of Law and Order of the Jefferson Family Court entered November 13, 2003. Adelaide Courtney Cromwell-Bosler brings Cross-Appeal No. 2004-CA-000640-MR from the same order. We affirm in part and

reverse in part and remand with directions Appeal No. 2004-CA-000401-MR and affirm Cross-Appeal No. 2004-CA-000640-MR.

James and Adelaide were married November 24, 1990. The marriage was dissolved by decree of dissolution entered September 20, 2002. The parties' property settlement agreement was incorporated into the decree of dissolution. Pursuant to the agreement, the parties shared joint custody of their two children, Lauren and Caroline. Adelaide was designated primary residential custodian, and James agreed to pay child support of $1,205.46 per month. Relevant to this appeal, the agreement provided James would pay Lauren's tuition at Our Lady of Lourdes School through the end of the 2002-2003 school year. The agreement further provided that James would not be responsible for payment of Lauren's tuition after the end of the 2002-2003 school year.[1]

On February 20, 2003, Adelaide filed a motion seeking, *inter alia*, payment by James of Lauren's private school tuition. James filed a motion on May 14, 2003, seeking removal of a guardian ad litem previously appointed to represent the children. On May 22, 2003, a hearing was conducted on the motions. At the hearing, testimony was presented that Lauren suffered an "emotional crisis" in the fall of 2002 and was not functioning well at Our Lady of Lourdes School. Adelaide

[1] Both the family court and the parties have treated the payment of educational expenses for Lauren as a form of child support.

testified that as a result of these events she transferred Lauren to Meredith-Dunn School (Meredith-Dunn) in November 2002.

The court entered its Findings of Fact, Conclusions of Law and Order on November 13, 2003. Therein, the court found that James admitted being responsible for tuition at Our Lady of Lourdes for the 2002-2003 school year. As concerns the payment of tuition at Meredith-Dunn, the court stated the following:

> KRS 403.211(3) permits the Court to deviate from the Child Support Guidelines if the Court makes a written finding or a specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case. It sets forth several criteria to deviate from the guidelines, including a child's extraordinary educational or special needs. According to KRS 403.211(4), the Court in its discretion is permitted to determine what is "extraordinary."
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> In the present action, the parties' minor child, Lauren, has had trouble in school since at least the first grade. Dr. George Haarmon evaluated her in the spring of 2001 when she was in the first grade at Our Lady of Lourdes School. He determined that she needed remedial help in several subjects and needed to be in a structured classroom. Although he found that she did not meet the criteria for any learning disability at that time, he recommended that she be evaluated in two years at the end of third grade.
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> Lauren continued to have problems at both home and school over the next year. (The Court notes that her parents separated in July of 2001.) Kathy Beam [Principal at Meredith Dunn School] met with Ms. Cromwell-Bosler and Lauren's teacher and principal in

the fall of 2001 when Lauren was in the second grade. At that time, Ms. Beam could not determine if Lauren had a learning disability or an auditory processing problem. She recommended that she be evaluated for attention deficit disorder and for a hearing problem.

Lauren's situation reached crisis proportions in the fall of 2002. Her parents' divorce became final on September 20, 2002. She continued to do poorly at Our Lady of Lourdes School. Ms. Cromwell-Bosler, who has a master's [degree] in elementary education, decided that Lauren could not function at that school and took her to Meredith Dunn School to be evaluated in November of 2002. That school determined that Lauren met the admissions criteria for that school, i.e., she was of average to above average intelligence with a learning disability. However, Lauren's emotional situation reached the breaking point soon thereafter and she was admitted to Caritas Peace Center because she was depressed and expressed thoughts of suicide.

Lauren's situation has stabilized since November of 2002. She has made great strides in reading and math. She has become more self-confident and happy. Her psychiatrist, Dr. Ora Frankel, has recommended that Lauren remain at Meredith Dunn. Therefore, the Court will deviate from the Child Support Guidelines and order Ms. Bosler be responsible for 26% and Dr. Bosler to be responsible for 74% of Lauren's tuition at Meredith Dunn School, effective February 20, 2003, when Ms. Cromwell-Bosler filed her motion, and continuing until further Order of the Court.[2]

[2] An agreed order was entered May 31, 2005, whereby the parties agreed Adelaide Courtney Cromwell-Bosler would be "responsible for paying any private school tuition, including but not limited to Meredith-Dunn School specifically through 2008, for their children, effective the date of this Order." Lauren's private school tuition from February 2003 through the end of the 2004-2005 school year remains in dispute.

The court also awarded Adelaide $750.00 in attorney's fees and denied James's motion to remove the guardian ad litem appointed for the children. These appeals follow.

James and Adelaide raise numerous issues in this appeal and cross-appeal. The primary point of contention of both parties, however, is whether James is responsible for payment of Lauren's tuition at Meredith-Dunn from February 20, 2003, through the 2004-2005 school year.

James contends the family court erred by ordering him to pay Lauren's tuition at Meredith-Dunn. James specifically contends the court did not have sufficient evidence to determine whether Lauren had "extraordinary educational needs" pursuant to Kentucky Revised Statutes (KRS) 403.211(3) to justify a deviation from the child support guidelines.

Before beginning our analysis, we note that our standard of review is governed by Ky. R. Civ. P. (CR) 52.01, which provides that findings of fact by the circuit court shall not be set aside unless clearly erroneous, with due regard being given to the opportunity of the court to judge the credibility of the witnesses. In divorce actions, this Court will not disturb the findings of a trial court unless those findings are clearly erroneous. Cochran v. Cochran, 746 S.W.2d 568 (Ky.App. 1988). Findings of fact are not clearly erroneous if supported

by substantial evidence. Ky. State Racing Comm'n v. Fuller, 481 S.W.2d 298 (Ky. 1972).

KRS 403.211(3)(b) provides for deviation from the child support guidelines where the court makes a specific or written finding that application of the guidelines would be unjust or inappropriate based upon the child's extraordinary educational needs. It is well-established that extraordinary educational needs are "those things not ordinarily necessary to the acquisition of a common school education but which become necessary because of the special needs of a particular student." Smith v. Smith, 845 S.W.2d 25, 26 (Ky.App. 1992).

Pursuant to KRS 403.211(4), a determination of whether a student's needs are "extraordinary" is within the discretion of the trial court. In the case *sub judice*, the court made detailed written findings. The court considered the testimony of several witnesses including Lauren's psychiatrist, Dr. Ora Frankel. Dr. Frankel diagnosed Lauren with major affective disorder, unipolar depression, and attention deficit hyperactivity disorder. Dr. Frankel recommended that Lauren remain at Meredith-Dunn. Based upon our review of the record, we do not believe the court abused its discretion in determining that Lauren had extraordinary educational needs.

James next contends that there was not a material change in circumstances justifying modification of child support

pursuant to KRS 403.213(1). Essentially, James contends that Adelaide was aware of Lauren's situation when she entered into the property settlement agreement; thus, there was not a material change in circumstance to justify modifying child support.

The record reflects the following: (1) the parties entered into the property settlement agreement on September 18, 2002; (2) Lauren had previously experienced difficulty in school, but her condition reached "crisis proportions" in the fall of 2002; and (3) Lauren was ultimately hospitalized at Caritas Peace Center in November 2002. In light of these facts, we believe James's contention that a material change in circumstances did not occur to be without merit.

James next contends the family court erred by modifying child support without consideration of Adelaide's gross income. James specifically asserts that the court did not have Adelaide's income information and, thus, could not make a determination of whether a modification of support was appropriate. A review of the record reflects the court found that Adelaide received monthly maintenance of $2,750 from October 1, 2002, to October 1, 2003, and would receive $2,500.00 per month from October 1, 2003, through October 1, 2006. Thus, the court did have sufficient income information for Adelaide and did not modify child support without considering the income

of both parties. Thus, we find James's argument to be without merit.

James also contends the family court erred by modifying child support without modifying maintenance. James argues that pursuant to the parties' property settlement agreement, if Adelaide sought a modification of child support, the terms of the maintenance agreement would be "set aside." The parties' agreement clearly states that if Adelaide seeks a modification of child support for any reason James "shall be entitled to seek a reduction of maintenance." The agreement does not provide, as James contends, that maintenance shall be "set aside" if a modification of child support is sought. Thus, under the agreement, James is entitled to move for modification of maintenance but clearly such modification is not mandatory.

James next argues that the circuit court effectively set aside the terms of the property settlement agreement by ordering him to pay tuition at Meredith-Dunn which was not provided for in the parties' agreement. James specifically asserts that Adelaide "is asking the Court to set aside part of the agreement of the parties as it relates to private school tuition and to keep the parts that are advantageous . . . ." James argues that if Adelaide wanted to set aside the property settlement agreement, she was required to file a motion pursuant to CR 59 within ten days of the decree being entered.

KRS 403.180 provides that a court may modify the provisions of an agreement as to child support, child custody or visitation. Parties cannot prevent the court from modifying the terms of their agreement regarding matters of child support. Berry v. Cabinet for Families & Children ex rel. Howard, 998 S.W.2d 464 (Ky. 1999). As such, James's contention that the court could not modify child support without setting aside the entire property settlement agreement is without merit.

James next contends the court erred by awarding $750.00 in attorney's fees to Adelaide. Specifically, James contends the family court relied solely upon the disparity in the parties' income and did not consider the other financial resources of the parties. Adelaide counters in her cross-appeal that the award was not adequate given the large disparity in the parties' income and the lack of liquidity in the assets that she was awarded.

KRS 403.220 clearly provides that the court may award attorney's fees "after considering the financial resources of the both parties." It is well-established that an award of attorney's fees is entirely within the discretion of the trial court. Tucker v. Hill, 763 S.W.2d 144 (Ky.App. 1988). Likewise, a trial court is not required to make specific findings of fact regarding the financial resources of the parties. Hollingsworth v. Hollingsworth, 798 S.W.2d 145

(Ky.App. 1990). The trial court is merely obligated to "consider" the financial resources of the parties. Id.

A review of the record in this case reveals that the family court considered the provisions of KRS 403.220 and applied the proper standard for awarding attorney's fees. The court was very familiar with the financial resources of both parties. The record reveals that James had monthly gross income of $8,000.00, while Adelaide's income was limited to maintenance in the amount of $2,750.00 per month ($2,500.00 effective October 1, 2003). Although Adelaide received considerable assets through the division of property provided for in the property settlement agreement, approximately half of the value of the property she received was from the marital residence. As such, we cannot say the court abused its discretion in awarding $750.00 in attorney's fees to Adelaide.

Finally, James contends that the retention of a guardian ad litem in this case and the costs associated therewith are no longer warranted. James points out that Lauren is now being treated by both a therapist and a psychiatrist, and receives the services of the parent coordinator appointed by the court. James argues the services of the guardian ad litem are no longer necessary and the guardian should be removed.

A guardian ad litem was appointed for Lauren and Caroline in the dissolution proceeding on February 14, 2002. A

dependency action had apparently been initiated in January 2002 and concluded in May 2002 where the guardian was also appointed. The guardian continued to represent the children in the post-decree dissolution proceedings.

KRS 387.305(5) governs the appointment of a guardian ad litem and provides, in relevant part, that "the duties of a guardian ad litem shall be to advocate for the client's best interest in the proceeding through which the guardian ad litem was appointed." We are not aware of any authority, nor have the parties cited this Court to any that would allow for the continued representation of the children by a guardian after entry of the decree of dissolution. Additionally, the family court made no findings sufficient to warrant the continued representation of the children by a guardian. As such, we conclude the court abused its discretion by denying James's motion to remove the guardian.

The only remaining argument for consideration is Adelaide's assertion that modification of the child support should have been retroactive to November 2002, rather than February 2003. KRS 403.213(1) provides that modification of child support may "be modified only as to installments accruing subsequent to the filing of the motion for modification." Although Lauren was transferred to Meredith-Dunn in November 2002, Adelaide did not file her motion until February 2003.

Thus, the court properly ordered that the modification was effective as of the filing of the motion in February 2003.

For the foregoing reasons, Appeal No. 2004-CA-000401-MR is affirmed in part and reversed in part and remanded with directions to remove the guardian ad litem from further representation of the children in this action. Cross-Appeal No. 2004-CA-000640-MR is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT/CROSS-APPELLEE:	BRIEFS FOR APPELLEES/CROSS-APPELLANTS:
Teresa M. Kinberger Louisville, Kentucky	Peter L. Ostermiller Louisville, Kentucky