RENDERED: NOVEMBER 8, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-002152-ME
AND
NO. 2013-CA-000010-ME

JOHN SHAUGHNESSY — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE TIMOTHY FEELEY, JUDGE
ACTION NO. 11-CI-00179

JACQUELINE ANNE RAINE — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: MAZE, STUMBO AND TAYLOR, JUDGES.

MAZE, JUDGE: Appellant/cross-appellee, John Shaughnessy, appeals the order of the Oldham Circuit Court concerning child support and primary residence of his daughter. Specifically, John challenges the trial court's rulings regarding school

tuition, activity fees, and medical expenses, as well as designation of Appellee/cross-appellant, Jacqueline Anne Raine (hereinafter "Anne"), as their child's primary residential custodian. In addition, Anne cross-appeals the trial court's reduction in child support to be paid by John. Following thorough review of the record and consideration of the parties' arguments, we hold that the trial court abused its discretion regarding the allocation of extraordinary medical expenses. However, we find no error regarding John's and Anne's other claims. Therefore, we affirm in part and reverse in part the order of the Oldham Circuit Court.

Background

The following facts are not in dispute. In March 2007, S.A. was born to John and Anne, who were unmarried. John and Anne raised S.A. together in Oldham County until October 2009 when they separated, at which time Anne and the child moved to Hardin County and Anne petitioned that county's family court for custody of her child. In June 2010, Anne and S.A. moved back to Oldham County and the custody case was transferred to Oldham Circuit Court. Anne and John both filed motions for temporary custody of S.A. and the trial court scheduled the matter for a hearing in June 2011. In the interim, the trial court granted the parties joint custody of their child with Anne as primary residential custodian and John having periodic visitation.

The trial court heard testimony in the case for the purpose of establishing temporary orders in the case. Based on this testimony, the trial court kept its "pre-temporary" orders for custody and visitation in place. In addition, the trial court found that Anne earned $60,000 annually and imputed John's $24,000 into income for purposes of calculating temporary child support. Accordingly, the court ordered John to pay $480.00 in monthly child support and 28.5% of the child's uninsured medical expenses which exceeded $100, consistent with his *pro rata* share of the couple's combined gross monthly income.

The trial court also ordered that a custodial evaluation be performed by one of four possible experts, to be decided upon by the parties. Anne moved that Dr. Kathryn Berla be selected and the trial court obliged. Dr. Berla filed her report on January 26, 2012, after interviewing Anne, John, and S.A., as well as at least three other sources. During the course of her conversations with Anne, Dr. Berla became aware of the fact that John allegedly kept unsecured firearms in his house and car that were accessible to S.A. This led Dr. Berla to report to Child Protective Services that John was possibly neglectful or abusive to S.A. In addition, Dr. Berla concluded that S.A.'s need for stability and consistency and the parties' respective apparent ability to provide these for S.A. required that Anne be the child's primary residential custodian.

In response, John moved the court for leave to seek another expert's, Dr. Feinberg's, opinion. Following his investigation, Dr. Feinberg expressed several concerns about Dr. Berla's report, including that she seemed "sympathetic

to and affirming of Anne and highly critical of John." He further expressed concerns about both Anne and John, including the lack of a "cooperative co-parenting relationship" between them. The report concluded that, despite several concerns regarding both parents, Anne and John both cared for their daughter and S.A. benefitted from her relationships with both parents. However, Dr. Feinberg found that "a more positive relationship [existed] between [S.A.] and John…" As a result, Dr. Feinberg recommended that John and Anne share permanent joint custody of S.A. and that the two arrange for equal parenting time with their daughter. Dr. Feinberg did not recommend either Anne or John as S.A.'s primary residential custodian.

The trial court set an initial trial date for the issues in this case for June 6, 2012. However, due to various conflicts in John's schedule, the court granted a continuance until August 2012. Mindful of the fact that S.A. would begin school in the interim, the trial court made John aware that it was granting Anne the power to enroll their child in a kindergarten of Anne's choice. Anne enrolled S.A. in Holy Trinity, a private school near her home in Jefferson County. The tuition for the school totaled $623.00 per month.

John's and Anne's depositions were taken on August 8, 2012. John testified in his deposition that he would like S.A. to attend school in Oldham County, be it a public or private school. He went on to say that if she attended a private school in Oldham County, he would pay for it. At trial, Anne testified that

she had requested John's input, but received no response. John had previously stated in his deposition that he could not remember receiving this e-mail.

Based on the testimony at trial and the reports of Drs. Berla and Feinberg, the trial court ordered, *inter alia*, that Anne remain the primary residential custodian of S.A.; that Anne and John split the cost of S.A.'s school tuition, as well as uninsured medical expenses evenly; and that John pay Anne $450.00 in monthly child support.[1] John moved the trial court to alter, amend or vacate its order, specifically objecting to the trial court's requirement that he share the cost of S.A.'s school tuition, as well as Anne's designation as primary residential custodian.

The trial court upheld its prior orders while further stating its reasoning for the decrease in John's child support as: 1) the "significant amount of parenting time" provided by John, though not equal to Anne's; and 2) the added expense of school tuition required of John under the court's order. The trial court also stated that it ordered John to assist with S.A.'s tuition because he had offered to do so "as long as [S.A.] attended the school of his choice." Following the trial court's refusal to amend its orders further, both John and Anne appealed to this Court.

Analysis

[1] For purposes of its final order, the trial court imputed John to an increased salary of $50,000 based on his earning ability as a self-employed attorney. This brought his *pro rata* share of his and Anne's combined gross monthly income to 45.5%.

John appeals the trial court's October 24 and November 21, 2012 orders on the following basis: 1) The trial court abused its discretion by requiring that he pay for tuition, extracurricular activities and medical expenses because this amounted to a deviation from statutory child support guidelines without making the written findings required by Kentucky Revised Statutes ("KRS") 403.212; and 2) the trial court abused its discretion in designating Anne as their child's primary residential custodian. In addition, Anne cross-appeals from the portion of the trial court's orders which lowered John's child support from the temporary order amount. Anne argues that if John is successful on appeal regarding any of John's obligations under the orders, his child support obligation must be increased accordingly. We elect to handle both John's and Anne's arguments regarding child support first before moving on to John's remaining arguments on appeal.

I. Child Support Calculation

As the decision of the trial court to deviate from the statutory child support guidelines is strictly within that court's discretion, we will only overturn that decision if it constitutes a manifest abuse of discretion or if the factual basis for its decision was clearly erroneous in light of the facts of the case. *McGregor v. McGregor*, 334 S.W.3d 113,116 (Ky. App. 2011); *see also Rainwater v. Williams*, 930 S.W.2d. 405, 407 (Ky. App. 1996). To amount to an abuse of discretion, the trial court's decision must be "arbitrary, unreasonable, unfair or unsupported by sound legal principles." *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App.

2001) (citing to *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000), and *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

Additionally, Kentucky trial courts are traditionally granted broad discretion in considering a parent's assets and setting correspondingly appropriate child support. *Downing*, 45 S.W.3d at 455 (citing *Redmon v. Redmon*, 923 S.W.2d 463 (Ky. App. 1992)). Therefore, as a reviewing court, we will defer to the trial court's discretion in child support matters whenever possible. *Id*. (citing to *Pegler v. Pegler*, 895 S.W.2d 580 (Ky. App. 1995)). As long as the trial court's decision comports with the guidelines, or any deviation from the guidelines is adequately justified in writing, this Court will not disturb the trial court's ruling in this regard. *Id*.

A. **Tuition and Extracurricular Activities**

While the statutory guidelines for calculating child support, based on parents' respective incomes, "serve as a rebuttable presumption for the establishment . . . of the amount of child support," it is also true that "[c]ourts may deviate from the guidelines where their application would be unjust or inappropriate." KRS 403.211(2). However, if a court deviates from the statutory guidelines, its order "shall be accompanied by a written finding or specific finding on the record . . . specifying the reason for the deviation." *Id*. Once made, such a finding sufficiently rebuts the presumption behind the statutory guidelines if based on at least one of the following factors: the child's extraordinary medical, dental,

educational, job training or special needs; the parents' extraordinary needs; the child's independent financial resources; agreement by parties; a combined gross income of the parents' in excess of that listed in the guidelines; or any other extraordinary factor which would make application of the guidelines "inappropriate." KRS 403.211(3). What is considered "extraordinary" is left to the trial court's discretion. KRS 403.211(4).

In its order of November 21, 2012, the trial court pointed out that Anne had enrolled S.A. in a Catholic school, that John had previously stated his preference for a Catholic school in Oldham County, and that both schools were private and under the same archdiocese's control. From this, the trial court seemingly found a basic agreement that the parties would share tuition expenses. John argues that the trial court abused its discretion by ordering him to pay half of S.A.'s private school tuition and extracurricular activity costs and by deviating from the child support guidelines in doing so. In both cases, he argues that he and Anne were required to agree to such expenses prior to any deviation. We disagree.

As support for his argument, John cites to KRS 403.211(3)(f), which states that a written finding in support of a deviation is sufficient if based upon, *inter alia*, the fact that "[t]he parents of the child . . . have agreed to child support different from the guideline amount." While John raises legitimate concerns about whether such an agreement truly existed, his argument ignores the fact that the trial court deviated based on two other factors: John's significant parenting time with

his child and because the court was requiring John to pay private school tuition. Hence, agreement by the parties to share private school tuition was only one of three factors the court expressly raised. John fails to address the other two.

The trial court's order of November 21, 2012, stated that, because it was "requiring [John] to contribute to [S.A.]'s private school tuition…" a deviation was necessary. Such a finding addresses at least one factor found in KRS 403.211(3)(b), "[a] child's extraordinary educational . . . needs[.]"[2] The trial court's order also clearly indicates that the reduction in John's child support was done in consideration of the fact that John would be incurring additional, and possibly substantial, expenses on his daughter's behalf and for her educational benefit. Such an equitable consideration complies with KRS 403.211(3)(b) and (g); and in the absence of John's argument to the contrary, we are unwilling to find that the trial court abused its discretion in deviating based upon these factors.

Regarding extracurricular activities, John misinterprets the trial court's order as deviating from the child support guidelines because it was simultaneously requiring John to pay half of S.A.'s extracurricular activities. Unlike private school tuition, the trial court did not state John's payment of extracurricular activities as a basis for its downward deviation in child support. Hence, his argument that because the parties did not agree on these costs, the court

[2] In the absence of any meaningful challenge from John concerning whether private school tuition constitutes "extraordinary educational needs," we do not rule on the matter. We simply acknowledge that the trial court's reason for deviating from the statutory guidelines was reasonable and based upon the factors listed in KRS 403.211(3).

erred in deviating based on them is misplaced. Rather, in addition to the court's considerable discretion on such matters, KRS 403.211 permits the trial court to deviate based upon the "child's extraordinary educational . . . needs." Since John does not challenge the "extraordinary" nature of the activities in question, we will not evaluate the matter. It suffices to say that the trial court acted within its considerable discretion in ordering John to pay half of S.A.'s extracurricular activities and that there is no indication that the trial court deviated from the statutory guidelines based on such activities.

Therefore, we find that the trial court complied with the requirements of KRS 403.211; and we hold that its findings were sufficient to justify a deviation from the statutory guidelines regarding tuition and did not constitute an abuse of its broad discretion.

B. Allocation of Uninsured Medical Expenses

John argues that the trial court abused its discretion in ordering that he and Anne each pay half of all extraordinary medical expenses incurred on S.A.'s behalf. On this point, we must agree with John.

KRS 403.211(9) is clear in its requirement that "[t]he cost of extraordinary medical expenses shall be allocated between the parties in proportion to their combined monthly adjusted parental gross income." This statute leaves little, if any, discretion to the trial court. Despite this, and despite John's income

comprising 45.5% of the combined gross income, the trial court deemed John responsible for half of S.A.'s extraordinary medical expenses. Given the clarity of the controlling statute's admonition to the contrary, this constituted an abuse of the trial court's discretion.

Anne concedes that, pursuant to statute, John's share of medical expenses must be 45.5%. However, she suggests that this Court must consider the meager difference of 4.5% in comparison to John's allegedly vast and newly found wealth. We reject these suggested factors as both irrelevant and unsupported in the law. KRS 403.211 simply permits no such consideration; and we shall not entertain it. The trial court abused its discretion in allocating the cost of extraordinary medical expenses in contravention of statute and we order that the matter be remanded to the trial court for entry of an order requiring John to pay such expenses in an amount proportional to his share of the parties' combined gross monthly income.

C. Anne's Cross-Appeal

In her cross-appeal, Anne argues that the trial court abused its discretion in deviating from the child support guidelines and reducing John's child support order based on his "significant parenting time" with S.A. She asserts that the "fairly normal" joint custody arrangement required the trial court to comply with, not deviate from, the guidelines. Anne further contends that, if John is

successful on appeal in further reducing his financial obligations to his daughter, we must order his court-ordered child support to be increased accordingly.

John contends that Anne's argument on cross-appeal is unpreserved because she did not file motions under Kentucky Rules of Civil Procedure ("CR") 59.05 or 52.02 following the trial court's orders; she merely responded to his motions for relief and alleged no error on the part of the trial court in doing so. We agree that Anne's arguments on cross-appeal are unpreserved and, therefore, we lack the proper jurisdiction to hear them.

CR 74.01(1) states that cross-appeals "shall be prosecuted like a regular appeal and governed by the Rules applicable thereto…." Accordingly, we have held that "if the trial court had no opportunity to rule on the question [raised on appeal or cross-appeal], there is no alleged error for this court to review." *Kaplon v. Chase*, 690 S.W.2d 761, 763 (Ky. App. 1985) (citing to *Payne v. Hall*, 423 S.W.2d 530 (Ky. 1968).

Anne's response to John's CR 59.05 and 52.02 motions raised no objections to the trial court's order and was more akin to a defense against John's motions. Anne's response did not state any disagreement with the trial court's reduction of John's child support due to his other financial obligations and it did not state that, if John was successful on his other claims, his child support obligation should be increased. This failure to raise any objection to the trial court's October 24 order meant that Anne deprived the trial court of the

opportunity to rule on the issues she now brings in her cross-appeal. Therefore, for purposes of Anne's cross-appeal, under *Kaplon*, "there is no alleged error for this court to review."

II. **Trial Court's Designation of Primary Residential Custodian**

Our Supreme Court has stated that

> since the family court is in the best position to evaluate the testimony and to weigh the evidence, an appellate court should not substitute its own opinion for that of the family court. If the findings of fact are supported by substantial evidence and if the correct law is applied, a family court's ultimate decision regarding custody will not be disturbed, absent an abuse of discretion. Abuse of discretion implies that the family court's decision is unreasonable or unfair. Thus, in reviewing the decision of the family court, the test is not whether the appellate court would have decided it differently, but whether the findings of the family court are clearly erroneous, whether it applied the correct law, or whether it abused its discretion.

Coffman v. Rankin, 260 S.W.3d 767, 770 (Ky. 2008) (citing to *B.C. v. B.T.*, 182 S.W.3d 213 (Ky. App. 2005). Therefore, we will only disturb the trial court's factual findings if they are clearly erroneous. CR 52.01; *see also Cherry v. Cherry* 634 S.W.2d 423 (Ky. 1982). Furthermore, we will reverse the trial court's custodial determination only if it constituted a "manifest abuse of discretion." *See Drury v. Drury*, 32 S.W.3d 521, 525 (Ky. App. 2000).

John argues that the trial court's decision to maintain Anne as S.A.'s primary residential custodian was erroneous because substantial evidence showed that it was in S.A.'s best interests that John, and not Anne, be deemed her primary

residential custodian. We disagree with John that the trial court's decision to the contrary constituted error or a manifest abuse of its discretion.

In determining custody of a child, including designation of a child's primary residential custodian, Kentucky law requires a judge to find what is in the best interest of the child. KRS 403.270(2); *see also Frances v. Frances*, 266 S.W.3d 754, 757 (Ky. 2008). In doing so, the trial court is to consider all relevant factors, including, but not limited to:

> (a) The wishes of the child's parent or parents . . .;
>
> (b) The wishes of the child as to his custodian;
>
> (c) The integration and interrelationship of the child with his parent or parents, his siblings and any other person who may significantly affect the child's best interests;
>
> (d) The child's adjustment to his home, school and community;
>
> (e) The mental and physical health of all individuals involved . . . .

Id. Generally speaking, a trial court has broad discretion in determining what is in the best interest of children when making determinations as to custody. *See Krug v. Krug*, 647 S.W.2d 790 (Ky. 1983). Furthermore, this Court has emphasized that "[t]he test for determining custody of a minor child is the best interest of the child, and not the most suitable person to have custody." *Davis v. Davis*, 619 S.W.2d 727, 729 (Ky. App. 1981) (citing to *Casale v. Casale*, 549 S.W.2d 805 (Ky. 1977)).

The basis for John's objection to the trial court's determination of primary residential custodian mostly centers around the court's reliance upon Dr. Bergla's report and her recommendation that Anne be so designated. John argues that Dr. Berla's report was biased toward him and relied on "collateral information" provided by Anne. As evidence of this bias, John points to the fact that Dr. Berla herself informed Child Protective Services regarding John's alleged possession of unsecured firearms around S.A., information which led to an investigation by that agency into John's fitness as S.A.'s custodian. To counter Dr. Berla's report, John asserts that Dr. Feinberg's report, as well as his suggestion that neither parent should be S.A.'s primary residential custodian, were more objective and, therefore, should have been relied upon by the trial court.

However, we find fault with John's argument that the trial court's decision to adopt one expert's recommendation over another's constituted a manifest abuse of its discretion. Dr. Berla's report expressed praise for the culture of discipline and activity present in Anne's home, as well as concern for the relative lack thereof in John's. Her report also expressed "a laundry list of other concerns about" John, including his behavior and attitude regarding Anne in the presence of S.A.

On the other hand, Dr. Feinberg reported a "more positive relationship" between S.A. and John than between S.A. and Anne, citing the fact that Anne tended to "over parent" S.A. However, Dr. Feinberg conceded that S.A. should spend the school year in Anne's primary custody, agreeing with Dr. Berla

that "structure and routine are her strong suit." In addition, Dr. Feinberg agreed with Dr. Berla that John's household was "unstructured" compared to Anne's and, more importantly, that S.A. enjoyed meaningful and loving relationships with both of her parents. Furthermore, Dr. Feinberg's recommendation was that neither parent be S.A.'s primary residential custodian.

In light of these facts, the trial court acted well within its discretion in adopting Dr. Berla's custodial recommendation. As is apparent from the record, evidence existed in support of both experts' respective recommendations. This being the case, we are unable to find that the trial court abused its discretion, or otherwise erred, in adopting one of these well-founded recommendations. Furthermore, while John and Dr. Feinberg expressed concerns regarding Dr. Berla's objectivity, we find nothing in the record which displays an obvious or inherent bias toward John. In the absence of such proof, we reserve judgments of credibility for the trial court, which was in the best position to make such observations and determinations.

John also asserts that it was in S.A.'s best interests to reside in Oldham County because S.A. was born, raised and has significant ties to Oldham as opposed to Jefferson County. He also states what he believes to be "common knowledge[:]" that Oldham County Public Schools are "far superior to those in Jefferson County" and S.A.'s educational interests are better served by attending the former. Once again, we disagree with John that either of these arguments is

sufficient to overturn the trial courts' designation of Anne as primary residential custodian.

Instead of the so-called superiority of Oldham County Schools, we focus our analysis on the irrelevance of such "common knowledge." The dispute at the time of trial surrounded which school S.A. should attend and the fact that Anne had unilaterally chosen a private one located in Jefferson County. However, John had testified that he was willing to assist with S.A.'s private school tuition if S.A. attended private school in Oldham County. Though the narrow possibility existed that S.A. might end up in a public school, the record reflects that both John and Anne heavily favored her attending a private school. In light of this fact, as well as the unsupported nature of John's comparison proffered on appeal, the quality of the two counties' respective *public* schools was properly excluded from the trial court's analysis.

John also argues that S.A. should reside in Oldham County, because S.A.'s father, extended family, pets, horses, and church are in Oldham County. However, there was equal reason, apparent from the record, that S.A. should primarily reside with her mother. S.A.'s mother and stepfather reside in Jefferson County and S.A. had recently begun school there at the time of trial. In short, while evidence may inevitably exist showing that S.A. has an interest in primarily residing with her father, sufficient evidence also exists in the record upon which the trial court properly based its finding that it was in S.A.'s best interest at that time to remain primarily with her mother.

As is so often the case, the evidence made this a difficult decision for the trial court to make based on experts' reports and witness testimony. Nevertheless, the decision the trial court made was well within its discretion and supported by evidence in the record. Accordingly, we find that John falls short of demonstrating that the trial court committed clear error and abused its discretion in designating Anne as S.A.'s primary residential custodian.

Conclusion

While we find that the trial court abused its discretion in misallocating responsibility for S.A.'s extraordinary medical expenses, we otherwise affirm the orders of the Oldham Circuit Court. Accordingly, we affirm in part and reverse in part, remanding the sole matter of extraordinary medical expenses to the trial court for entry of an order consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-APPELLEE:

Victoria Ann Ogden
Lauren Adams Ogden
Louisville, Kentucky

BRIEF FOR APPELLEE/CROSS-APPELLANT:

Douglas E. Miller
Radcliff, Kentucky