

NO. 2017-CA-001288-ME

ROBERT L. THOMPSON

APPELLANT/CROSS-APPELLEE

v. CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A. CHRISTINE WARD, JUDGE
ACTION NO. 11-CI-504131

SONYA R. THOMPSON (NOW COLE) APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

** ** * ** * **

BEFORE: CLAYTON, CHIEF JUDGE; DIXON AND JONES, JUDGES.

JONES, JUDGE: These consolidated appeals and cross-appeal arise out of several post-dissolution orders of the Jefferson Circuit Court concerning the parties' minor child. Following review of the record and applicable law, we affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

I. BACKGROUND

After eighteen years of marriage, Sonya R. Thompson ("Sonya") and Robert L. Thompson ("Tommy") were divorced in October of 2014. While the divorce proceedings were fairly contentious, the parties agreed to share custody and enjoy equal parenting time with their minor child ("Child"). However, the

parties were unable to resolve issues of child support and maintenance. In its Findings of Fact, Conclusions of Law, and Supplemental Decree of Dissolution, entered December 12, 2014, the trial court ordered Tommy to pay Sonya \$1,500 per month in child support (hereinafter, referred to as the “Child Support Order”).

Additionally, the trial court ordered that:

Tommy shall pay 59% of [Child]’s health insurance, extraordinary medical costs, work related child care, camps and agreed upon activities such as music lessons and athletic programs. Sonya shall pay 41% of the cost of the above itemed expenses.

R. 631. The trial court reached the above percentages based on its findings regarding the parties’ monthly gross incomes. Specifically, the trial court found that Tommy grossed approximately \$33,335 per month and that Sonya grossed approximately \$23,471 per month, including income imputed to her by the trial court. Sonya has appealed that order, and it is currently pending before this panel. (No. 2015-CA-001564-ME).

After the parties separated, Child began “acting out” and having behavioral problems. Child’s troubles were first brought to the trial court’s attention in May of 2015, when Sonya filed a motion to increase child support, modify parenting time, and reinstate maintenance. Sonya attached an affidavit to that motion averring that Child had been “kicked out” of his after-school program, which resulted in him having to be picked up from school each day by 2:30 p.m.

Sonya argued that the parties' time-sharing schedule with Child should be altered so that she had Child every week day. Sonya stated that this change would be in Child's best interest, as it would ensure that Child was not left unsupervised after school while Tommy was working. Anticipating a change in the parties' parenting schedules, Sonya requested that the trial court order Tommy to pay additional child support. The trial court dismissed the portion of Sonya's motion requesting reinstatement of maintenance. Sonya has appealed that order, and it is currently pending before this panel. (No. 2016-CA-001859-ME).

Unfortunately, Child's behavioral problems continued to escalate. Things reached a head when Child was arrested for stealing a firearm and attempting to trade it for marijuana in March of 2016. Because of his concern with Child's troubling behavior, Tommy reached out to an educational consultant, Anne Thompson, to evaluate Child. Following that evaluation, Child was sent to Second Nature, a wilderness therapy program for troubled teenagers located in Georgia. Child underwent a psychological evaluation while at Second Nature. The psychological evaluation diagnosed Child with Oppositional Defiant Disorder, Alcohol Use Disorder, Cannabis Use Disorder, Adjustment Disorder, and Parent-Child Relational Problem. The psychologist who evaluated Child recommended that Child enroll in a residential treatment center once he completed treatment at Second Nature. Based on that recommendation, Child was enrolled at The High

Frontier, a residential treatment center and boarding school located in Fort Davis, Texas. Child continues to reside at The High Frontier.

On August 10, 2016, Tommy filed a motion to terminate his child support obligation based on the fact that Child had not resided with either party since April of 2016. At the time he filed his motion, Tommy anticipated that Child would remain at The High Frontier for several more months. Tommy noted that he had advanced all the significant costs associated with Child attending these programs. Because Child had not resided with Sonya since April 2016, Tommy contended that Sonya no longer had any expenses related to Child. Accordingly, Tommy requested that his child support obligation be terminated at least until Child returned to Kentucky.

Sonya responded that Child's absence from Kentucky was merely temporary. Sonya noted that, in the meantime, she continued to maintain her home, which had been purchased for Child and herself. Additionally, Sonya preemptively argued that she should not be required to reimburse Tommy for the expenses he incurred related to Child's treatment. Sonya pointed out that she had experienced a recent change in her income and had recently filed motions to increase child support and reinstate maintenance payments. She further contended that she had never agreed to enroll Child at The High Frontier. In a separate motion, Sonya moved the trial court to compel Tommy to provide documents in

response to her discovery requests.¹ The trial court granted Sonya's motion as related to Tommy's personal 2014 and 2015 tax returns, but otherwise found that Tommy was not required to produce the documents requested.

Next, Tommy moved the trial court to allocate Child's extraordinary expenses. Tommy again noted that he alone had advanced all costs related to Child's treatment, which, by that point, had reached almost \$90,000. Additionally, Tommy stated that he had paid for Child to attend Alpine Basketball Camp in the summers of 2014 and 2015, but that Sonya had continually refused to reimburse him for her portion of those costs. Tommy requested that the trial court order Sonya to reimburse him for 41% of the costs he incurred for Child's residential treatment/schooling and basketball camps. Additionally, as Tommy anticipated that Child would remain at The High Frontier for some time, he requested the trial court allocate Child's ongoing monthly expenses between the parties.

Sonya's motion to increase child support, Tommy's motion to terminate child support, and Tommy's motion to allocate Child's extraordinary expenses were heard by trial court over two nonconsecutive days. Dr. James

¹ Specifically, Sonya had requested the following information: a complete copy of Tommy's 2014 income tax return and the 2014 income tax returns for all of Tommy's businesses; a copy of all of Tommy's bank accounts with signatory authority or any interest from January 1, 2014, to the present; a copy of all documents Tommy intended to introduce as exhibits at the hearing for Sonya's motion to increase child support and reinstate maintenance; a complete list of assets owned by Tommy; Tommy's most recent statements from all IRA accounts, 401(k) accounts, profit sharing, and/or retirement accounts in which he has an interest; a complete list of Tommy's monthly expenses; and a copy of the signed 2014 state and federal tax returns for Thompson & Chou, Tommy's medical practice, along with any attachments.

Shields, Child's psychologist in Louisville, Kentucky, testified first. Dr. Shields testified that he began seeing Child in April of 2014 due to Sonya and Tommy's concerns about Child's emotions after their divorce. In total, he had seen Child about thirty-four times, with their last session being at the end of January 2016. Dr. Shields testified that he was aware of Child's "acting out" and how that had caused issues for him both at school and at home. He was also aware that Child had been arrested. Dr. Shields testified that he believed Child needed more than outpatient treatment, but that he was unfamiliar with Second Nature and The High Frontier, the two facilities Child attended. Dr. Shields testified that Child's sessions with him were 100% covered by insurance.

Next, Hugh Sawyer, a CPA, testified on Sonya's behalf. When the Child Support Order was entered, both parties' primary source of income had come from their respective 25% ownership interests in TMV Properties. Shortly after the Child Support Order was entered, Sonya filed a lawsuit against TMV Properties. The suit settled, which resulted in Sonya's interest in TMV Properties being purchased for approximately \$2.5 million in May of 2016. Mr. Sawyer explained that Sonya would owe a 27% capital gains tax on the \$2.5 million, which would amount to approximately \$445,000.

Next, Becky Farrer, the school principal at The High Frontier, testified. Ms. Farrer explained that The High Frontier is a residential treatment

facility for youths aged twelve through eighteen. The High Frontier works with students who have demonstrated emotional and/or behavioral challenges. Ms. Farrer testified that The High Frontier does provide a school component for the youths residing there; however, the main component of the program is the therapeutic component. Ms. Farrer stated that The High Frontier offers all the programs recommended for Child in his psychological evaluation—inpatient treatment, individual and group therapy, substance-abuse treatment, and family therapy sessions. The therapeutic component of The High Frontier is what distinguishes it from a traditional public school. Ms. Farrer testified that she had no concerns that Child’s placement at The High Frontier was inappropriate. On cross-examination, Ms. Farrer testified that The High Frontier is a private school and that, while she was unsure of the exact cost, she knew the school was not free. Ms. Farrer testified that she had never spoken with Sonya and was unaware if Sonya had signed any contract related to Child’s treatment at The High Frontier.

Toni Sands, Child’s therapist at The High Frontier, testified next. Ms. Sands testified that The High Frontier is designed to provide emotional, social, and developmental support to its students. She stated that part of the program’s goals is to help students work on the emotional and behavioral difficulties they are experiencing and to help them learn and develop empathy and personal responsibility. Ms. Sands testified that she works directly with Child in individual,

group, and family therapy settings. She stated that Child participates in three ninety-minute group therapy sessions per week and has individual therapy sessions twice a month. Additionally, The High Frontier gives its students the opportunity to engage in spontaneous group therapy sessions at their request. Ms. Sands discussed Child's various emotional and behavioral issues and opined that The High Frontier was a good program to meet his needs. She stated that Child still needed to address the depth of the problems that led to him being enrolled at The High Frontier. Ms. Sands testified to her belief that, if Child were to be discharged early, he would be at risk for resuming his old behaviors. On cross-examination, Ms. Sands noted that Child—who at the time of her testimony was thirteen years old—was the youngest individual in his therapy group. She stated that there could be other facilities that offered treatment similar to the treatment offered by The High Frontier, but she did not have any names of such facilities. Ms. Sands testified that she was unaware of whether the therapy portion of The High Frontier was covered by health insurance.

Sonya testified next. She testified that she was seeking an increase in child support payments because Child's expenses were greater than what she had originally anticipated. Sonya stated that she had increased parenting time with Child because of Tommy's work schedule, and that she had been "digging into" her 401(k) and savings accounts to cover the extra expenses. She testified that she

had made and taken Child to the majority of his appointments with Dr. Shields. Sonya stated that she was still incurring expenses on Child's behalf. For example, Sonya paid nearly \$3,000 per month for the mortgage on her home and had to pay for yard maintenance, as her yard was nearly ten acres. Sonya testified that she could not afford the home and would not have such a large home, but she wanted her home to be the substantially the same as Tommy's home for Child's benefit. Additionally, Sonya testified to expenses she incurs when visiting Child in Texas.

Sonya expressed her belief that Child was ready to return to Kentucky immediately. Sonya testified that she had not signed Child up for The High Frontier and had not even been told about the decision to enroll him there. She stated that she found out that Child was going to Texas the day before he was to be discharged from Second Nature. Sonya testified that Tommy had arranged for Child to go to Second Nature while she had been hospitalized. She stated that she signed the form giving consent for Child to go to Second Nature, but she had felt that she had no other choice. Sonya testified that she cannot afford the expenses being incurred for Child's treatment currently and did not feel that she should be responsible for any portion of the costs. While Sonya acknowledged that Child was having troubles and did need some kind of treatment, she expressed her opinion that Child's troubles occurred at Tommy's home and not at her home. Sonya stated that she believed there were other, age-appropriate treatment

programs in which Child could be enrolled that were closer to home and that insurance would cover.

On cross-examination, Sonya again stated that when Child was in Kentucky he had spent more time with her than he had with Tommy. She admitted that she had never alleged that in any pleading or paper filed with the court. Sonya acknowledged that she had recently received \$88,000 in insurance proceeds as a result of a condominium she owned having burned down. She stated that she received \$2.5 million in May of 2016 from selling her interest in TMV Properties. Sonya testified that she did not think that Child needed services for his substance abuse problems; however, she was impeached on this point when Tommy's counsel showed her a portion of a recent deposition in which she stated that Child did need rehabilitation services. Sonya admitted that she had signed the paperwork for Child to attend Second Nature and had read the portion on the form indicating that Second Nature did not bill insurance carriers; however, she stated that she had been medicated at the time she read and signed the form. Sonya stated that, besides giving Tommy a copy of Child's insurance card, she had not made any efforts to file claims with the insurance company and have Child's expenses covered. She acknowledged that she, not Tommy, covered Child on her insurance plan. Sonya stated that she had never agreed for Tommy to enroll Child at The High Frontier, but she had been under the assumption that The High Frontier was

part of the Second Nature program. She stated that she wanted Child to return to Kentucky immediately; however, she acknowledged that this was the first time she had suggested that Child leave The High Frontier.

Tommy testified next. He disagreed with Sonya's assertion that she had Child in her care more than he did. Tommy testified that Child's behavioral issues had first arisen when Child was in elementary school, but that over time incidents started happening more frequently. Child had been suspended from his middle school and was later expelled and placed in an alternative program where he worked on assignments from home or from the superintendent's office. Tommy stated that, generally, both he and Sonya were present at the school to discuss Child's behavioral issues. He testified that Child's being arrested had been the "last straw." Following Child's arrest, he had hired Ms. Thompson as an educational consultant and had looked into Second Nature upon her recommendation.

Tommy testified that after researching Second Nature he spoke with Sonya about enrolling Child in the program, and she agreed. His understanding was that the costs of Child's treatment would be split in accordance with the Child Support Order. He stated that he had agreed to pay the costs up front to get the process started and that Sonya had not offered any alternative program for their consideration. Tommy testified that he cannot afford to continue paying all of the

costs for Child's treatment, but that he will do what he has to do to keep Child there until he is ready to return home. Tommy stated that he saw no reason why he should continue to pay Sonya child support while Child is at The High Frontier.

On March 9, 2017, Sonya filed a motion for Child to be returned to Kentucky. In an attached affidavit, Sonya averred that she had never agreed to send Child to The High Frontier and expressed her opinion that Child could obtain adequate treatment in Kentucky. Tommy responded on March 21, 2017. Attached to his motion was a letter from Ms. Sands, which stated that it was in Child's best interest to remain at The High Frontier until his discharge. Ms. Sands stated that leaving The High Frontier early would put Child at "risk of relapse with his drug and alcohol use," and would "disrupt his progress in familial repair and restoration." Additionally, Ms. Sands noted that Child had recently backslid in his progress, as he seemed to believe he would soon be returning home to Kentucky. The trial court appointed a friend of the court ("FOC") on March 31, 2017.

On May 12, 2017, the court entered an order regarding child support and Child's extraordinary expenses. The trial court found that, despite Sonya's contentions at the hearing that she had been given no choice, the testimony and evidence presented at the hearing clearly established that Sonya had agreed for Child to attend Second Nature. The trial court noted that Child's enrollment at The High Frontier had been based on the recommendations of Ms. Thompson, the

Second Nature staff, and the psychological evaluation. Additionally, the trial court noted that Sonya had testified that she knew Child would be transferred from Second Nature to The High Frontier and had made no objection.

The trial court found that there had been changes in the parties' finances since the Child Support Order was entered. The trial court found that Sonya's 2015 income tax return demonstrated an income of \$234,361 and that Tommy's 2015 income tax return demonstrated income of \$424,791. For 2016, the trial court found that Sonya had received \$269,000 in distributions from TMV Properties, plus the \$2.5 million for the sale of her interest in TMV Properties. Additionally, Sonya had received \$88,000 in insurance proceeds. The trial court found that Sonya had not received any income from the company she owned, Therapy Works, Inc. The court found that Tommy had received \$368,808.25 from TMV Properties; approximately \$130,000 from Thompson & Chou; and income of \$10,000 from the Shepherdsville Family Health Clinic in 2016.

For its conclusions of law, the trial court examined each of the claimed "extraordinary expenses" Tommy had incurred for Child in light of the plain language of the Child Support Order. The trial court first noted that the plain language of that order did not require extraordinary medical costs, work-related child care, or camps to be agreed upon in advance as a condition precedent to those expenses being allocated between the parties. The trial court further took note of

the definition of extraordinary medical expenses, found in KRS² 403.211(9). The trial court concluded that Child's time at Second Nature and The High Frontier, as well as the psychological evaluation and the educational consultation, constituted reasonably necessary psychiatric/counseling treatment to address Child's substance abuse and mental health issues. The trial court concluded that none of those expenses had been covered by insurance and, accordingly, that they should be divided as set forth in the Child Support Order. Additionally, the trial court concluded that Sonya should reimburse Tommy for 41% of the total costs he had incurred in sending Child to the Alpine Basketball Camp. The trial court denied both parties' motions concerning Tommy's child support obligations, as it found that neither had demonstrated a substantial and continuing change in circumstances.

On May 16, 2017, Sonya filed a second motion for Child to be returned to Kentucky, this time stating that Child was in serious endangerment at The High Frontier. On May 22, 2017, Sonya filed a motion to have the trial court alter, amend, or vacate the May 12, 2017 order. Her motion additionally requested relief under CR³ 59.01, CR 59.07, CR 60.02, and requested that the court make additional findings of fact pursuant to CR 52.01, CR 52.04, and *Anderson v.*

² Kentucky Revised Statutes.

³ Kentucky Rules of Civil Procedure.

Johnson, 350 S.W.3d 453 (Ky. 2011). The trial court denied Sonya’s motion. Thereafter, Sonya filed a notice of appeal from the May 12, 2017 order, and Tommy filed a notice of cross-appeal.

Sonya re-noticed her motion for Child to be returned to Kentucky on May 23, 2017. In the affidavit attached to her motion, Sonya informed the trial court of concerns that had arisen during her most recent visit with Child at The High Frontier. Sonya averred that she had observed blood stains and stab marks on Child’s shirt and that Child had several bruises. She alleged that Child had informed her that he had been assaulted by other students at The High Frontier on several occasions. Additionally, she alleged that Child had told her about a recent incident where another student had induced him to “huff” paint. Sonya stated that staff at The High Frontier delayed in informing her about the huffing incident. Sonya also alleged that Child was no longer receiving weekly counseling sessions at The High Frontier.

A case management conference (“CMC”) concerning Sonya’s motions to have Child returned to Kentucky was scheduled for June 21, 2017. The FOC tendered his report to the parties that morning. The report first summarized interviews the FOC had conducted with Sonya, Tommy, Dr. Shields, a staff member at The High Frontier, and Charlene Sexton, a friend of the family and “pseudo-grandmother” to Child. Based on the information gleaned from those

interviews, the FOC expressed his opinion that it was in Child's best interest to remain at The High Frontier until he is discharged. The FOC expressed concerns that part of Sonya's motive for wanting Child to return to Kentucky was financial. The report noted that, while Sonya had informed the trial court about her concerns with Child's safety at The High Frontier, she had never raised those issues with any staff member at The High Frontier. Additionally, the FOC indicated that he had great concern that Sonya's minimization of Child's behavior and her own substance abuse issues hindered her ability to effectively support Child's treatment. Because of Sonya's own issues and reports that Sonya had been informing Child about the court proceedings, the FOC recommended that the trial court consider temporarily limiting Sonya's contact with Child and recommended that Sonya engage in individual therapy.

At the beginning of the CMC, Sonya's counsel stated that it was an opportune time for Child to return to Kentucky, as his school semester had recently ended. Counsel conveyed Sonya's belief that it would be in Child's best interest to return to Kentucky, where he would be adequately supervised and could resume weekly counseling sessions. The trial court then noted that the FOC had spent a lot of time and energy into compiling his report, which included a recommendation that Child remain at The High Frontier. The trial court stated that, based on the

FOC Report, it was not inclined to grant Sonya's motion to return Child to Kentucky.

The FOC was sworn in and gave testimony. The FOC expressed his concern that Child was aware of the court proceedings and indicated his belief that this knowledge had been detrimental to Child's treatment. The FOC stated that Sonya seemed to struggle with having insight into how her past behaviors have affected Child and how her current behavior is now affecting Child's treatment. The FOC expressed his doubts that Sonya was working cooperatively with Child's treatment team. He also opined that Child was manipulating Sonya. At the close of the case management conference, the trial court indicated that it would be denying Sonya's motion to have Child returned to Kentucky.

An Order Re: Child's Treatment was entered on June 29, 2017.

Therein, the trial court admonished both parties not to discuss the pending litigation with Child and to work to support Child in his treatment. The trial court noted that Sonya had requested a hearing on her motion to have Child return to Kentucky, but it found that there was no additional evidence that could be brought before it to justify the relief Sonya sought. The trial court denied Sonya's motion to have Child returned home from The High Frontier.

Also on June 29, 2017, Sonya moved the trial court for leave to file a response to the FOC report. On July 10, 2017, Sonya filed a motion requesting the

trial court to alter the Order Re: Child's Treatment to make it a final and appealable order. Additionally, Sonya contended that the order should be amended to allow a hearing on Sonya's motions for Child's return. Sonya contended that a hearing was necessary so that she could cross-examine the FOC and provide additional information and testimony to the trial court. At motion hour on July 10, 2017, the trial court orally denied Sonya's motion for leave to file a response to the FOC report.

On July 12, 2017, the trial court entered an Order Clarifying Order Entered June 29, 2017 and Denying Motion for Leave to File Response to FOC Report. In that order, the trial court expressly stated that it did not rely on the FOC Report in denying Sonya's motion for Child to return to Kentucky. The trial court stated that the only orders relying upon the FOC's recommendations were the "best interest" orders based on concerns raised at the case management conference. The trial court clarified that its determination that a hearing was not necessary to rule on Sonya's motion was based on the fact that it had recently heard substantial proof concerning Child's treatment at The High Frontier during the hearing to modify/terminate child support and to allocate Child's extraordinary expenses. The trial court explicitly denied Sonya's request to file a response to the FOC report. The July 12, 2017 order was deemed final and appealable. Sonya then appealed from that order.

II. STANDARD OF REVIEW

“The trial court is vested with broad discretion in the establishment, enforcement, and modification of child support.” *Bjelland v. Bjelland*, 408 S.W.3d 86, 87 (Ky. App. 2013). “Accordingly, this court reviews child support matters under an abuse of discretion standard, *i.e.*, whether the decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Id.* (citing *McKinney v. McKinney*, 257 S.W.3d 130, 133 (Ky. App. 2008)). Factual findings will only be disturbed if clearly erroneous. CR 52.01. “A factual finding is not clearly erroneous if it is supported by substantial evidence.” *Bjelland*, 408 S.W.3d at 88 (citing *Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky. App. 2002)).

III. ANALYSIS

These consolidated appeals and cross-appeal raise several issues, which will be addressed as follows. First, we address Sonya’s contention that the trial court erred in allocating Child’s extraordinary expenses. Next, we address Sonya’s argument that the trial court erred in denying her motion for an increase in child support and Tommy’s argument that the trial court erred in denying his motion to terminate child support. Finally, we address Sonya’s contention that the trial court erred in denying her motion to return Child to Kentucky without first having an evidentiary hearing or allowing Sonya to respond to the FOC report.

A. Allocation of Child's Extraordinary Expenses

Sonya makes multiple arguments to support her contention that the trial court erred in requiring her to reimburse Tommy for a portion of Child's extraordinary expenses, each of which is discussed below.

i. Classification of Extraordinary Medical Expenses

The Child Support Order required the parties to divide Child's extraordinary medical expenses in proportion to their respective incomes.

Extraordinary medical expenses are defined as:

[U]ninsured expenses in excess of one hundred dollars (\$100) per child per calendar year. "Extraordinary medical expenses" includes but is not limited to the costs that are reasonably necessary for medical, surgical, dental, orthodontal, optometric, nursing, and hospital services; for professional counseling or psychiatric therapy for diagnosed medical disorders; and for drugs and medical supplies, appliances, laboratory, diagnostic, and therapeutic services.

KRS 403.211(9). Notably, the Child Support Order does not require the parties to agree on Child's extraordinary medical expenses as a condition precedent to the costs of those expenses being divided between the parties.

The trial court found the following expenses related to Child's treatment meet the definition of extraordinary medical expenses: educational consultation, psychological evaluation, Second Nature, and The High Frontier. In making that determination, the trial court concluded that none of those expenses

were covered by insurance. While Sonya acknowledges that no portion of these expenses had been paid by her insurance provider, she contends that they should have been. Sonya notes that Tommy failed to demonstrate that he made claims with her insurance provider and that those claims were rejected. Accordingly, she contends that the trial court should have found that all expenses were covered by insurance, thereby removing those expenses from the definition of “extraordinary medical expenses” and alleviating Sonya of her obligation to pay a portion of those expenses.

Child has coverage under Sonya’s health insurance policy. Sonya acknowledged that she read the portion of the consent form for Second Nature that stated that Second Nature does not bill insurance carriers. Sonya testified that, despite having this knowledge, she never attempted to make a claim with her insurance company concerning Child’s expenses. She contended that Tommy should be responsible for filing claims with her insurance carrier. Other than repeatedly stating that Child’s therapy sessions with Dr. Shields were covered by insurance—suggesting that because those sessions were covered Child’s other therapeutic treatment would also be covered—Sonya presented no evidence that any of the expenses at issue would have been covered by insurance. Tommy testified that he had been informed that these expenses would not be covered by insurance. He acknowledged that he had not contacted Sonya’s insurance provider

about the incurred expenses, but stated that he had not done so because his name is not on the policy.

In concluding that Child's medical expenses were uninsured, the trial court noted that no evidence had been presented suggesting that the expenses were covered under Sonya's insurance policy. It further noted that it was extremely unlikely that anyone would choose to pay over \$100,000 in medical expenses out-of-pocket when those expenses could have been covered by insurance. Based on the evidence and testimony presented, the trial court did not abuse its discretion in classifying Child's medical expenses as uninsured. Moreover, we believe that because the policy of insurance was under Sonya's name, she bore the burden of proving that expenses were covered. She failed to do so.

Next, Sonya takes specific issue with the trial court's classification of Child's enrollment at The High Frontier as "reasonably necessary professional counseling and psychiatric/therapeutic service." Because Child attends classes at The High Frontier in addition to receiving therapeutic services, Sonya contends the trial court should have classified The High Frontier as a private school, for which she should not be required to pay.

There is no dispute that Child does attend school at The High Frontier and that The High Frontier is not part of the public school system. However, the testimony presented at the hearing established that Child was not sent to The High

Frontier for his educational needs. Ms. Farrer testified that The High Frontier is similar to an inpatient treatment facility, in that it offers individual therapy, substance abuse treatment, and family therapy sessions. Ms. Farrer explained that the therapeutic component is the main feature of The High Frontier, and that she was unaware of any student who had been enrolled at The High Frontier solely for educational reasons. Testimony from Dr. Shields, as well as both of Child's parents, demonstrated that Child does have emotional and behavioral issues, which were not being adequately addressed by Child's parents or Dr. Shields. Testimony established that those issues were escalating and causing problems in Child's life. Further, Child's psychological evaluation, which was admitted into evidence, demonstrated that Child had been diagnosed with various disorders. The trial court's finding that Child was at The High Frontier for psychiatric and therapeutic treatment was supported by substantial evidence. It did not err in classifying expenses incurred for The High Frontier as an extraordinary medical expense.

Finally, Sonya contends that she should not be required to pay the expenses incurred for the educational consultant and the psychological evaluation because Tommy did not consult her prior to obtaining these services. We reject this argument. As pointed out by the trial court, the Child Support Order does not require the parties to agree on Child's extraordinary medical expenses as a prerequisite to those expenses being divided between them. There was no

evidence presented that Tommy acted in bad faith in having Child evaluated. Given Child's behavioral and emotional problems, the decision to have Child evaluated was reasonably necessary to ensure that that he received proper and timely treatment.

In sum, we find no error in the trial court's classification of Child's extraordinary medical expenses.

ii. Alpine Basketball Camp Expenses

Tommy's motion to allocate Child's extraordinary expenses requested reimbursement for a portion of the expenses Tommy incurred sending Child to Alpine Basketball Camp in the summers of 2014 and 2015. The combined cost for Child to attend camp in 2014 and 2015 was \$10,144.03.

In its findings related to the Alpine Basketball Camp, the trial court found that Tommy spent \$10,144.03 to send Child to camp in 2016. Based on the plain language of the Child Support Order, the trial court concluded that Sonya was required to pay 41% of Child's camp costs. Sonya does not dispute that the Child Support Order requires the parties to divide camp costs for Child. She contends that the trial court erred in its factual determinations because Child did not attend Alpine Basketball Camp in 2016. Sonya notes that the amount Tommy spent for Child to attend Alpine Basketball Camp in 2014 had already been discussed at the initial child support hearing, in October of 2014. She additionally

contends that she should not be responsible for the 2015 Alpine Basketball Camp expenses, as those expenses should be classified as Tommy's vacation expenses.

The trial court's finding that Tommy expended \$10,144.03 to send Child to Alpine Basketball Camp in 2016 is clearly erroneous. Tommy's motion expressly stated that he was requesting reimbursement for the amounts expended in 2014 and 2015. It was established that Child was in treatment during the summer of 2016 and that, therefore, he did not attend Alpine Basketball Camp that summer.

The years for which Tommy sought reimbursement for camp costs are highly relevant to the trial court's analysis. At the initial child support hearing in October of 2014, Tommy testified that he paid for Child to attend basketball camp in the summer of 2014. Tommy included this amount as part of Child's monthly expenses. The Child Support Order entered by the trial court after this hearing noted that Tommy had paid for basketball camp in 2014; however, it did not include any requirement that Sonya reimburse Tommy for that expense. The Child Support Order was effective as of January 2015. Accordingly, the trial court abused its discretion in requiring Sonya to reimburse Tommy for a portion of the Alpine Basketball Camp expenses incurred in 2014.

Sonya acknowledges that any expenses Tommy incurred sending Child to the Alpine Basketball Camp in 2015 arose after entry of the Child Support Order. She contends, however, that those expenses should not be considered camp

expenses, but rather expenses Tommy incurred vacationing with Child. To support this argument, Sonya directs our attention to a portion of an order entered June 5, 2015, in response to Sonya's motion to restrain Tommy from sending Child to camp. In pertinent part, that order states as follows:

IT IS HEREBY ORDERED that Child may attend camp in Alabama for the summer of 2015 for up to two weeks.

IT IS FURTHER ORDERED that the parties shall each be allowed two weeks of summer vacation time with their son, Child. Child's time at the camp shall be counted against [Tommy's] time.

R. 881.

We do not read this language as modifying the requirement that the parties share the costs of Child's camp. It merely dictates that, should Tommy choose to sign Child up for camp, the time Child spends at camp will be deducted from the vacation time Tommy would otherwise have with Child.

Because the trial court's conclusion that Sonya should reimburse Tommy for 41% of the \$10,144.03 he spent sending Child to camp was based on an erroneous finding of fact, to wit, that Child attended camp in 2016, we reverse and remand the portion of the trial court's order concerning allocation of camp costs. On remand, the trial court should make findings as to what portion of the \$10,144.03 is attributable to the cost for Child to attend camp in 2015. Sonya should be required only to reimburse Tommy for 41% of the 2015 camp costs.

iii. Calculation of Sonya's reimbursement

Sonya briefly argues that, even if the trial court is correct in requiring her to pay a portion of Child's expenses, the trial court erred in requiring her to pay 41% of those expenses. Sonya acknowledges that the Child Support Order required her to pay 41% of Child's extraordinary medical expenses and camp costs. She contends, however, that in May of 2015—when she first filed her motion to increase child support—the parties' incomes had changed. However, at no time during the hearing did Sonya contend that the trial court should reassess the percentage of Child's expenses that she is required to pay.

Sonya notes that in the May 12, 2017 order, the trial court found that Tommy's 2015 income tax return showed an income of \$424,791 and that her 2015 income tax return showed an income of \$234,361. Accordingly, Sonya argues that the trial court should have divided Child's extraordinary expenses and camp costs with Tommy paying 64% and her paying 36%. Sonya's calculation does not include the income imputed to her by the trial court.

We are unsure why Sonya claims the trial court should recalculate the allocation of Child's extraordinary medical expenses as of May 2015. Sonya's motion for an increase in child support payments did not request that the trial court do so. Further, and more importantly, all of Child's medical expenses for which Tommy sought reimbursement occurred in 2016 and 2017. KRS 403.211(9) states

that “[t]he cost of extraordinary medical expenses shall be allocated between the parties in proportion to their combined monthly adjusted parental gross incomes.” That is what the trial court did when it entered the Child Support Order. As Tommy’s motion for allocation of Child’s extraordinary expenses requested that the trial court allocate those expenses pursuant to the Child Support Order, the trial followed the language of that order and did not reallocate expenses. However, had it done so, it would have presumably used the parties’ incomes for 2016, the year Child’s expenses were incurred and the year that Tommy filed his motion.

iv. Expenses incurred before September 20, 2016

Finally, Sonya argues that she should only have to reimburse Tommy for her portion of Child’s extraordinary expenses incurred after September 20, 2016, the date on which Tommy filed his motion to allocate Child’s expenses. She contends that the trial court “could not have ruled on [Tommy’s] motion to determine what is and what is not an ‘extraordinary’ expense until after that date.” We are not persuaded by this argument. The trial court did, in fact, determine that expenses incurred before September 20, 2016, constituted extraordinary medical expenses. There is no statutory requirement that parties submit alleged extraordinary expenses to the court before incurring them as a prerequisite to being reimbursed. Such a requirement would not make sense because it could delay a

child receiving needed and appropriate care. The trial court properly exercised its discretion in classifying the already incurred expenses as extraordinary.

B. Modification of Child Support

Both Sonya and Tommy challenge the trial court's denial of their respective motions to modify Tommy's child support obligation. "The provisions of any decree respecting child support may be modified . . . only upon a showing of a material change in circumstances that is substantial and continuing." KRS 403.213(1).

i. Sonya's motion for increased child support

Sonya contends that the trial court abused its discretion in denying her motion for an increase in child support, as she believes that she clearly demonstrated a substantial and continuing change in circumstances. When Sonya filed her first motion for an increase in child support in May of 2015, she alleged that her income had substantially decreased as she was no longer receiving the \$12,000 per month distributions from TMV Properties. Payments from TMV Properties were suspended from March through October of 2015; however, distributions resumed in November 2015 and in January 2016 all missed payments from TMV Properties were made up. Sonya sold her ownership interest in TMV Properties for \$2.5 million in May of 2016.

Sonya's motion for an increase in child support was not heard until late February and early March of 2017. While Sonya acknowledged that circumstances had changed since she first filed her motion, she contended that she was still entitled to receive increased child support payments. Sonya argued that Child's expenses had increased, despite the fact that Child had not resided with her since March of 2016. Sonya admitted that she had never made this claim before the hearing and she offered no evidence to show how Child's expenses had increased. Instead, Sonya informed the court of expenses related to her home, which she had been living in at the time of the initial hearing on child support. Sonya informed the trial court that her rental property, for which she had previously been receiving a gross of \$1,000 per month, had burned down. She stated that she had been issued a check for \$88,000 in insurance proceeds due to the fire. Sonya alleged that she never actually saw this money, but that her power of attorney had taken the check and deposited it into an annuity account. Sonya urged the court to consider that she was no longer receiving \$12,000 per month from TMV Properties. While she acknowledged that the reason she was no longer receiving those payments was because she had sold her interest in the company, and received \$2.5 million in exchange for that interest, she contended that she would never actually see that amount after paying taxes and "all that."

The trial court found that Sonya's taxable income in 2015 was \$234,361. While Sonya did not submit her tax returns for 2016, the trial court noted that in 2016 Sonya had received a total of \$2,769,000 from TMV Properties and \$88,000 in insurance proceeds. The trial court noted that at the time the Child Support Order was entered, the trial court had found that Sonya received \$237,250 in TMV Properties distributions in 2014, received \$1,000 gross per month for her rental property, and imputed to Sonya the ability to earn between \$35,000-\$36,000 per year as an occupational therapist and owner of a business. The trial court noted that Sonya testified that she was not receiving any income from her company, Therapy Works.

Based on these findings, the trial court determined that the change in circumstances of which Sonya complained was neither continuing nor material. It noted that the most significant change in circumstance claimed by Sonya was the loss of income from TMV Properties. However, the trial court observed that while Sonya was no longer receiving monthly income from TMV Properties, she received \$2.5 million from selling her interest, which had actually increased her income in 2016. The trial court concluded that Sonya should not receive a windfall by claiming a decrease in income when she had chosen to convert an income stream into an asset. Because Sonya had produced no evidence supporting her

contention that Child's expenses had increased, the trial court denied Sonya's motion to increase child support.

“The burden of proof rested with [Sonya] on [her] motion to modify child support, which required the showing of a material change in circumstances that is substantial and continuing.” *Shelton v. Shelton*, 446 S.W.3d 663, 666 (Ky. App. 2014) (citing KRS 403.213(1)). Sonya simply did not meet this burden. The trial court properly found that Sonya's income had remained substantially the same in 2015 as it had been in 2014 and that her income had actually increased in 2016. Sonya contends that the trial court erred by considering the \$2.5 million payment as her income in 2016. She argues that this payment should actually be viewed as a decrease in her income as, after considering taxes on that amount and assuming that she lives for 32 more years, that payment will equal out to roughly \$5,350 per month. We disagree. “[W]hen a parent receives income from a nonrecurring event, the trial court should include that amount in the year received” *Clary v. Clary*, 54 S.W.3d 568, 574 (Ky. App. 2001).

Sonya additionally argues that the trial court erred in denying her motion to compel Tommy to produce financial documents and records, including tax returns for Thompson & Chou, Tommy's bank records, and his list of monthly expenses. The trial court required Tommy to produce only his personal tax returns, with all attachments, for 2014 and 2015, and he did so. Sonya contends that

because the trial court denied her motion to compel, it was only able to consider Tommy's income as shown on his personal income taxes and, therefore, was unable to determine Tommy's actual earning capacity.

Sonya's argument in support of increasing child support payments was that *her* income had substantially changed, not that Tommy's income had substantially increased. Because the trial court found that Sonya failed to demonstrate a substantial and continuing change in circumstances, which is necessary to modify child support, there was no need to consider Tommy's income to determine how his child support payments should be modified. Any error on the court's part in denying Sonya's motion to compel was harmless.

ii. Tommy's motion to terminate child support

In August of 2016, Tommy moved the trial court to terminate his child support obligation until Child returned to Kentucky and resumed his joint timesharing schedule with Tommy and Sonya. At the hearing, evidence was presented that Child had not lived with either Tommy or Sonya since March of 2016 and that there was no determined date on which Child would return. In denying Tommy's motion to temporarily terminate his child support obligation, the trial court noted that both parties testified that they desired Child to come home as soon as he was ready. The trial court found that there had been no evidence that Child would need long-term, continuing residential care. Additionally, the trial

court noted that both parties continued to maintain a home for Child, for which they incurred expenses, and continued to incur expenses related to Child's care. Accordingly, the trial court found that there had been no material change in circumstances.

Tommy contends that there is no authority in Kentucky providing for a parent who does not have the child in her possession to continue receiving child support payments. He directs our attention to *Rodney P. v. Stacy B.*, 169 S.W.3d 834 (Ky. 2005), which addressed what effect a minor child's detention in a state agency had on the child support payment of the noncustodial parent. In *Rodney P.*, the parties had two children, one of whom had been committed to the custody of the Department of Juvenile Justice. The exact duration of that child's commitment to the Department was unknown. On Stacy's motion to increase child support, the trial court calculated Rodney's child support obligation as if both children were still residing with Stacy and the Court of Appeals affirmed. The Kentucky Supreme Court reversed and held that Rodney's child support obligation should be calculated on the basis of Stacy having custody of one child, "until and unless the Department or the juvenile court has restored [the detained child] to Stacy's custody or Stacy proves that she is substantially contributing to the support of [the detained child]." *Id.* at 837.

In *Rodney P.*, the Court found that “Stacy did not testify to any expenditures that she had made on [the detained child’s] behalf during the commitment, and she did not identify any expenses related to [the detained child] that could not be avoided during [his] extended absence.” *Id.* at 836. The Court specifically acknowledged that, had Stacy testified to “any expenditures on [the detained child’s] behalf or any fixed expenses that could not be avoided in [the detained child’s] absence[,]” the analysis would be different. *Id.* at 838.

In the present case, Sonya testified to her fixed expenses, part of which she incurred because of Child. For example, Sonya testified that she would not live in such a large home if Child did not reside with her part of the time. She testified that she had to maintain her vehicle because that is what she uses to transport Child when he is with her. Sonya additionally testified that she made trips to Texas to visit Child at The High Frontier and that it was recommended that she do so. In order to make these trips, Sonya has to purchase a plane ticket, rent a vehicle, and pay for a hotel room for her and Child to stay in. When visiting Child in Texas, Sonya pays for his meals and purchases personal items for him.

Because Sonya offered testimony concerning her continued expenses related to supporting Child, we cannot find that the trial court abused its discretion in denying Tommy’s motion to terminate his child support obligation.

C. Denial of Sonya's Motion to Return Child to Kentucky

Sonya has also appealed from the Order Re: Child's Treatment, entered on June 29, 2017, and the Order Clarifying Order Entered June 29, 2017, and Denying Motion for Leave to File Response to FOC Report, entered July 12, 2017. Sonya contends that the trial court abused its discretion and violated her due process rights when it denied her request to have a hearing on her motion to return Child to Kentucky and when it refused to allow her to file a response to the FOC Report. She contends that, at the very least, she should have been allowed to file a written response to the FOC Report. We agree.

All of Sonya's motions requesting that Child be returned to Kentucky were passed to the CMC held on June 21, 2017. The FOC did not tender his report to the parties until that morning, shortly before the CMC began. At the outset of the CMC, the trial court noted that the FOC had "put in a lot of time and energy in compiling this report, including recommendations that the child will stay at High Frontier." The trial court then concluded that it was "not inclined to do anything other than that, based on the report of the FOC, at this time." The trial court then allowed the FOC to testify, and his report was submitted into evidence.

In the Order Re: Child Treatment the trial court summarized the recommendations made by the FOC, specifically noting that the FOC recommended that Child remain at The High Frontier until he is discharged. The

trial court stated that it believed there was no additional evidence that could be brought before it to justify the relief Sonya was seeking. Besides stating that it had previously heard substantial evidence regarding Child's treatment and that it was well acquainted with the parties' history, the trial court made no factual findings supporting its decision that it was in Child's best interest to remain at The High Frontier. The trial court later denied Sonya's motion to respond to the FOC Report. Sonya was not permitted to cross-examine the FOC at the CMC and, because the trial court denied Sonya's motion to have an evidentiary hearing, Sonya was unable to cross-examine the FOC at a later point.

The trial court did hear extensive testimony concerning Child's treatment at The High Frontier during the February/March 2016 hearings. That testimony concerned Child's need for treatment and the type of treatment he was receiving at The High Frontier. However, in her motions to return Child to Kentucky, Sonya alleged incidents that had not yet occurred at the time of the February/March 2016 hearings. Her motions for Child to return home cited concerns that Child was not adequately supervised at The High Frontier and that, as a result of that lack of supervision, he had been assaulted on multiple occasions and had been huffing paint thinner. No testimony has been taken on these allegations.

Moreover, the FOC was not appointed until *after* the February/March 2016 hearings. Accordingly, he had not yet filed a report and was not subject to cross-examination at the time of the prior hearing. KRS 403.300(3) explicitly states that “[a]ny party to the proceeding may call the [FOC] and any person whom he has consulted for cross-examination.” This is not a suggestion to the trial court, it is a mandate. An FOC’s “file *must* be made available to the parties, and the [FOC] himself or herself *must* be available for cross-examination.” *Morgan v. Getter*, 441 S.W.3d 94, 113 (Ky. 2014) (emphasis added) (citing KRS 400.300(3)).

Sonya clearly has a protected liberty interest in the care and custody of her son. *Id.* at 111-12 (citing *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000)). The trial court created a risk that Sonya’s fundamental interest would be impaired when it declined to hold an evidentiary hearing. *Id.* at 112. The FOC’s report contained numerous findings and recommendations that were adverse to Sonya. In declining to hold a hearing on Sonya’s motion, Sonya was denied the opportunity to question any of the persons interviewed by the FOC and she was unable to cross-examine the FOC and challenge his recommendations. “[I]n domestic custody proceedings, the parties’ right to due process includes the right to cross-examine the authors . . . of evidentiary reports upon which the fact finder is entitled to rely.” *Ibid.* This should be the same in determinations concerning the child’s care, especially when

one of the child's custodians had adamantly objected to the care being received and cited concerns about the child's safety.

IV. CONCLUSION

Regarding the Order Re: Child Expenses and Support entered May 12, 2017, we affirm in part, reverse in part, and remand. The May 12, 2017 order is reversed only inasmuch as it requires Sonya to pay 41% of costs incurred by Tommy to send Child to the Alpine Basketball Camp in 2014. On remand, the trial court is instructed to make findings as to what costs Tommy incurred sending Child to the Alpine Basketball Camp in 2015 and enter an order requiring Sonya to pay only the 41% of 2015 costs. We reverse and remand the trial court's orders entered June 29 and July 12, 2017. On remand, the trial court shall hold an evidentiary hearing on Sonya's motions to return Child to Kentucky, at which the parties shall be permitted to cross-examine the FOC as well as any person he consulted.

ALL CONCUR.

BRIEFS FOR APPELLANT/ CROSS-
APPELLEE:

Harold L. Storment
Louisville, Kentucky

BRIEFS FOR APPELLEE/ CROSS-
APPELLANT:

Melanie Straw-Boone
Peter J. Catalano
Louisville, Kentucky