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OPINION OF JUNE 26, 2020, WITHDRAWN

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-001207-ME

CHRISTOPHER RIDGEWAY APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT, FAMILY DIVISION
v. HONORABLE LAUREN ADAMS OGDEN, JUDGE
ACTION NO. 12-CI-502111

JESSICA WARREN[1] APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: CALDWELL, JONES, AND TAYLOR, JUDGES.

[1] The notice of appeal misspells the appellee's surname as "Warren." We have corrected the misspelling for purposes of this opinion, as her last name should be spelled "Warken."

CALDWELL, JUDGE: Christopher Ridgeway ("Ridgeway") appeals from a Jefferson Family Court Order mandating that the parties' child, S.J.R.,[2] attend Meredith Dunn School for the 2019-2020 school year, including the summer/transition program and that the parties shall divide the cost of S.J.R.'s attendance (tuition, books, and required fees) in proportion to their incomes. Ridgeway contends that the trial court improperly deviated from the child support guidelines and ordered him to pay for private school tuition in the absence of his agreement to do so, and in the absence of a showing that public schools would be inadequate to meet the child's educational needs in violation of Kentucky law. As the trial court failed to make the requisite finding that public schools would be inadequate to meet the child's educational needs in ordering Ridgeway to pay for private school tuition over his express objection and without any clear finding that he had agreed to paying such tuition, we VACATE the trial court's order and REMAND for further proceedings in conformity with this opinion.

FACTS AND PROCEDURE

Following S.J.R.'s experiencing academic difficulties in the parochial school she had originally attended, her parents had differences of opinion concerning what should be done to help address her needs. Her mother, Jessica Warken ("Warken") believed that her transferring to Meredith Dunn, a private

[2] We will refer to the minor child by her initials rather than her name to protect her privacy.

school, would be best. In February 2019, Warken filed a motion with the trial court asking it to enter an order allowing her to enroll S.J.R. at Meredith Dunn beginning with the 2019-2020 school year, to apply for financial aid and asking that Ridgeway be required to assist in the financial aid application process. Ridgeway filed a response, setting forth his objections to the child attending Meredith Dunn, including: the cost, his concerns about Meredith Dunn being "strictly a special needs school," and his belief that Jefferson County Public Schools (JCPS) would be more "inclusive" and offer more accommodations and government oversight. He also stated that Warken had paid for parochial school through tithing and stated that he had not paid private school tuition.

A hearing was held on Warken's motion in March 2019, in which the trial court reserved ruling on whether S.J.R. would ultimately attend Meredith Dunn until an evidentiary hearing could be held. The trial court, however, did order then that Ridgeway assist Warken in applying for admission and financial aid at Meredith Dunn to "preserve that as an option" noting the school's reputation and the upcoming deadline for applying for financial aid. A hearing on the motion for S.J.R. to attend Meredith Dunn was set for May.

In the meantime, Ridgeway and Warken jointly applied for financial aid at Meredith Dunn expressly noting that Ridgeway was doing so under court order in late March 2019. Ridgeway contends that he wished to enroll S.J.R. in

public school and was trying to make arrangements for her to get needed services and accommodations in public schools, but that he could not get the necessary cooperation from Warken to pursue public school enrollment options until early May 2019.

The trial court heard evidence on Warken's motion to enroll S.J.R. at Meredith Dunn on May 14 and 21, 2019. Both parties and their respective counsel were present, along with a friend of the court. The trial court heard testimony from psychologist Dr. Patricia McGinty, as well as both parties and the friend of the court. The trial court made factual findings in its order dated May 31, 2019.

Relevant to this appeal, the trial court made an explicit finding that S.J.R. had extraordinary educational needs:

> In this case, the parties' child unquestionably has extraordinary educational needs that have shown limited, if any improvement after two years' implementation of a Student Accommodation Plan and the assistance of private tutors. The child's academic delays have become so pronounced that she is unable to return to her school for second grade. The child's teachers, tutors, school principal, school counselor, and pediatrician have all referred her to a specialized school. A comprehensive psychological evaluation yielded the same recommendation.

The trial court then issued its mandate:

> Accordingly, [S.J.R.] shall attend Meredith Dunn School for the 2019-2020 school year, including the summer/transition program. The parties shall divide the cost of [S.J.R.'s] attendance (tuition, books, and fees) in

> proportion to their incomes.[3] Both parties shall cooperate with [S.J.R.'s] evaluation at the Weisskopf Center. They shall also cooperate with a JCPS evaluation, to see if [S.J.R.] can be transitioned to a traditional school in the future. Both parties shall follow all medical, counseling, and academic recommendations.

(Order dated May 31, 2019). Following a brief discussion concerning passing other pending motions to a later date, the trial court then concluded the order by stating that "[w]ith regard to Ms. Warken's motion regarding school choice, this is a final and appealable order and there is no just cause for delay in its entry."

Ridgeway filed a timely motion to alter, amend or vacate the trial court's order in early June, stating numerous grounds including: that he never agreed to have S.J.R. attend Meredith Dunn or to pay for any private school tuition (and that the trial court statement that he had "agreed" to S.J.R. attending a "school specializing in developmental delays" such as Meredith Dunn was erroneous) and that in the absence of an agreement to pay private school tuition, the trial court could not order him to do so without a finding that public schools were inadequate to meet the child's educational needs, citing authority including *Miller v. Miller*, 459 S.W.2d 81, 83-84 (Ky. 1970). He argued that proof presented at the hearing showed that JCPS/public schools could provide an adequate education for S.J.R.

[3] Evidence was presented at the hearing concerning the parties' respective incomes. Ridgeway's income was approximately twice that of Warken's. Thus, he would be responsible for paying about two-thirds of the tuition and other costs for S.J.R. to attend Meredith Dunn.

and that newly discovered evidence since the hearing would provide further support, including showing that "lag time" concerns about getting accommodations quickly could be addressed. He made other arguments as well, essentially contending that Meredith Dunn could not meet S.J.R.'s needs as well as JCPS. In addition to requesting that the trial court vacate its prior order in favor of ordering that S.J.R. attend JCPS instead, he also requested that a new trial be scheduled "on the issue of JCPS which will accommodate the July 1st deadline at Meredith Dunn."

While this motion to alter, amend or vacate was pending, the parties resolved other issues regarding custody and support of S.J.R. in an agreed order which was entered on July 2, 2019. That same day, the trial court also issued a brief order denying Ridgeway's motion to alter, amend or vacate and to schedule a new trial without further explicit discussion of the school choice issue. Ridgeway then filed a timely notice of appeal.

Warken filed a motion to strike Ridgeway's appellant's brief, contending that it does not include proper citations to the record. We find that the citations to the record in Ridgeway's initial and reply briefs are adequate for this Court to review the key issue in this case—whether the trial court's order for him

to pay for private school can stand.[4] Therefore, Warken's motion to strike Ridgeway's brief has been denied by separate order.

STANDARD OF REVIEW

In reviewing the establishment, modification, and enforcement of child support obligations, we review for abuse of discretion. *Plattner v. Plattner*, 228 S.W.3d 577, 579 (Ky. App. 2007). The test for abuse of discretion is whether the trial court's decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001).

Upon our review of the record, the trial court did not make the necessary findings under Kentucky law to properly order Ridgeway to pay private school tuition. Thus, we vacate its order and remand to the trial court for further proceedings in conformity with this opinion and the governing standards of Kentucky law including the binding precedent of *Miller v. Miller*, 459 S.W.2d 81 (Ky. 1970), as well as Kentucky Revised Statutes (KRS) 403.211.

[4] While we find the briefs adequate to permit review of this key issue and conclude that the trial court's mandate that he pay for S.J.R. to attend private school (Meredith Dunn) for the 2019-2020 school year must be vacated due to lack of necessary findings, we decline to address minor sub-issues seemingly raised in the briefs which are not necessary to our determination here such as 1) whether the trial court had any sort of bias concerning Meredith Dunn based on certain comments but not apparently pursued through a motion for recusal or 2) whether the trial court's admission of the pediatrician's letter listing S.J.R.'s possible learning differences was improperly admitted under hearsay rules.

ANALYSIS

We note that the trial court correctly recognized that ordering a parent to pay private school tuition is a deviation from the Kentucky child support guidelines. And the trial court properly recognized that to grant a deviation from the Kentucky child support guidelines, there must be a showing of proper grounds under KRS 403.211(3), and that two possible grounds for deviation would include an agreement to deviate from the guidelines (KRS 403.211(3)(f)) or a child's extraordinary educational needs (KRS 403.211(3)(b)). The trial court made no clear, explicit finding that the parties had agreed to a deviation from the guidelines (here, for Ridgeway to pay private school tuition). The trial court did explicitly find that S.J.R. had "extraordinary educational needs." Nonetheless, the trial court failed to address binding Kentucky case law requiring that in the absence of an agreement, a trial court cannot order a parent to pay private school tuition without a showing that public schools are inadequate for a child's educational needs.

Ridgeway explicitly objected to Warken's motion to enroll S.J.R. at Meredith Dunn based on its cost, his refusal to pay for private school tuition, and his contention that public schools could adequately address S.J.R.'s needs, likely better than Meredith Dunn. Following the trial court's order for S.J.R. to attend Meredith Dunn and for the parties to share the cost in proportion to their respective incomes, his motion to alter, amend or vacate cited authority including *Miller v.*

Miller, *supra*, and argued that the trial court's order was improper as there was no showing that public schools would be inadequate to meet the child's needs.

Despite the trial court's finding that S.J.R. had extraordinary educational needs, this finding alone was not sufficient to properly allow an order requiring a parent to pay for private school tuition as binding Kentucky case law clearly holds that absent an agreement to pay private school tuition, a parent cannot be ordered to do so unless there is a showing that public schools are inadequate to meet the child's educational needs.

In *Miller*, the Kentucky high court reversed that part of a trial court judgment which ordered a parent to pay private school tuition on the grounds of "there being no satisfactory proof in this record that the public schools of Jefferson County are inadequate for educational purposes for these children and no proof that any of the children suffer a handicap that would make public schools unsuitable[.]"[5] 459 S.W.2d at 83-84. The *Miller* case is now about fifty years old, perhaps contains some antiquated language, and pre-dates the enactment of the Kentucky child support guidelines. Nevertheless, it has never been overruled or

[5] We note that Ridgeway has argued that there has been no showing that Jefferson County public schools would be inadequate to meet S.J.R.'s needs. It does not appear that either party has made any arguments concerning whether S.J.R. "suffer[s] a handicap that would make public schools unsuitable."

held to be superseded by statute and, thus, is binding precedent under Kentucky Rules of the Supreme Court (SCR) 1.030(8)(a).

The applicability of *Miller* along with the Kentucky child support guidelines was recognized in *Smith v. Smith*, 845 S.W.2d 25 (Ky. App. 1992), in which a party cited *Miller* to argue that a trial court's ordering a parent to pay for private music lessons as an "extraordinary educational need" supporting a deviation from child support guidelines was improper:

> The appellant contends that the court erred in finding that his son's private music lessons should be considered "extraordinary education" so as to allow a modification in child support. He compares this situation to that in *Miller v. Miller*, Ky., 459 S.W.2d 81 (1970), where the court reversed an order requiring a non-custodial parent to pay private school tuition in the absence of proof that the public schools were inadequate for educational purposes and proof that the child suffered a handicap which would make the public schools unsuitable. The appellant contends that since there is no proof that the parties' son cannot take music lessons from the public school in which he is attending, nor is the parties' son handicapped in any way that would require him to attend private school, the appellant should not be required to pay additional child support.

Id. at 25-26.

The Court of Appeals agreed with the appellant that the order requiring payment for music lessons must be reversed and indicated that the definition of "extraordinary educational needs" should not be so broadly defined as

to create more extensive child support obligations than those supported by the common law, including *Miller*:

> We cannot agree with the legal conclusion that the statute encompasses private music lessons in its definition of "extraordinary educational needs." As used in the statute, we believe "extraordinary educational needs" refers to 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. While we may be of the opinion that a parent ought to seek to maximize a child's talents, we do not think the statute was intended to change the common law of this jurisdiction which requires a parent to provide only primary and secondary education. *See Miller v. Miller*, 459 S.W.2d at 83.

Id. at 26.

Although recent published cases citing *Miller* have often not squarely addressed its standard for determining when a trial court could properly order that a party pay private school tuition as part of its child support obligation, they have also not explicitly disturbed it. In *McCarty v. Faried*, 499 S.W.3d 266 (Ky. 2016), the Kentucky Supreme Court's opinion can be read as suggesting that it did not agree with the trial court's view that the *Miller* case was no longer binding despite ultimately reversing the Court of Appeals and reinstating the trial court's child support order. Its discussion of the case facts addressed how the trial court had vacated an earlier ruling requiring a parent to set aside money each month for an educational fund and noted that:

> In doing so, the trial court stated that it abandoned its prior reference to private school education despite its belief that *Miller v. Miller*, 459 S.W.2d 81 (Ky. 1970) "is outdated and no longer the law." The Court of Appeals' Opinion took issue with the trial court's interpretation of *Miller*, stating that *Miller* is still good law. The trial court's view of *Miller* as expressed in her order was not presented to this Court for review, therefore our holding in the present case is not an endorsement of the trial court's view in regard to *Miller*.

Id. at 271 n.7.

While not relying on unpublished cases, we note that the standard in *Miller* has been cited in our unpublished cases upholding trial courts' decisions declining to impose an obligation to pay private school tuition absent agreement,[6] including a case in which a child's learning differences were alleged to create

[6] *Finck v. Finck*, Nos. 2003-CA-002398-MR and 2003-CA-002445-MR, 2005 WL 1252305, (Ky. App. May 27, 2005) at *4 (citing *Miller* in upholding denial of request for payment of parochial school tuition given lack of evidence that public school would be inadequate for child); *Day v. Day*, Nos. 2002-CA-001540-MR and 2002-CA-001633-MR, 2003 WL 22753548, (Ky. App. Nov. 21, 2003) at *3 (upholding denial of request for additional child support to cover private school tuition based on *Mille*r due to lack of evidence of child having "handicap" or local public schools being "unsuitable" and obligor parent's objection to child attending private school).

extraordinary educational needs.[7] In short, we conclude that absent an agreement, a parent cannot be ordered to pay private school tuition unless the trial court also finds that public schools have been shown to be inadequate to meet the child's needs under the binding precedent of *Miller, supra*.

From our review of the trial court's order, it appears that the trial court may have concluded that Meredith Dunn would be a better option for S.J.R. than public schools, but there was no finding that the public schools would be *inadequate* to meet her needs. It further appears the trial court may have been following the friend of the court's recommendation that S.J.R. attend Meredith Dunn for the 2019-2020 school year based on his assessment of S.J.R.'s best interests but failed to heed his warning that the trial court may not be able to properly order a parent to pay private school tuition absent an agreement. As the trial court's order seemingly indicated that Ridgeway had not agreed to pay private

[7] *Calloway v. Densler*, No. 2014-CA-001694-MR, 2016 WL 552748 (Ky. App. Feb. 12, 2016) at *2 ("The trial court also found that it could not force Appellee to pay for private school under the facts of this case. Pursuant to Kentucky Revised Statutes (KRS) 403.211(3)(b), a court may deviate from the child support guidelines if a child has extraordinary educational needs. In other words, a trial court may require a parent to pay for private school if the child has extraordinary educational needs. In order for this to occur, the parent seeking funds for extraordinary educational needs must show that public schools are inadequate to provide for the educational needs of the child. *Miller v. Miller*, 459 S.W.2d 81, 83 (Ky. 1970). In the case at hand, Appellant presented a great deal of evidence that DePaul addresses the child's educational needs, but she did not present any evidence as to the ability of public schools to address those needs. Without this evidence, the trial court correctly found that it could not order Appellee to pay the child's private school tuition.").

school tuition[8] and as there was no finding that the public schools were inadequate to meet S.J.R.'s needs, we vacate and remand for further proceedings in conformity with this opinion.

TAYLOR, JUDGE, CONCURS.

JONES, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

JONES, JUDGE, DISSENTING: Respectfully, I dissent. As noted by the majority, *Miller v. Miller*, 459 S.W.2d 81 (Ky. 1970), is the seminal case addressing what is necessary before a family court may order a parent to pay for private school tuition. In that case, the Court held that the trial court erred because there was "no satisfactory *proof in this record* that the public schools of Jefferson County are inadequate for educational purposes for these children and no *proof* that any of the children suffer a handicap that would make public schools unsuitable[.]" *Id.* at 83 (emphasis added).

Based on the evidentiary proof presented at the hearing in this case, it is clear that S.J.R. has extraordinary educational needs, which permit a deviation

[8] The trial court would need to make a finding that public schools would be inadequate for the child's needs to order a parent to pay private school tuition, whether the deviation from child support guidelines was based on extraordinary educational needs (KRS 403.211(3)(b), another factor of an extraordinary nature (KRS 403.211(3)(g), or any other factor under KRS 403.211(3) except for agreement (KRS 403.211(3)(f)). As the trial court did not make a clear finding of an agreement nor a finding that public schools were inadequate for the child's needs and we vacate to make proper findings, we need not reach Warken's arguments that the trial court's decision could be supported on alternate grounds of KRS 403.211(3)(g) or KRS 403.211(3)(b) based on the parties' prior history.

from the child support guidelines. *See* KRS 403.211(3)(b). Additionally, I believe there was sufficient proof adduced at the hearing regarding the present inability of JCPS to expeditiously address S.J.R.'s unique learning disabilities in a way that served her best interests. In fact, the family court referenced this proof in its lengthy opinion. On page 5 of its opinion, the family court specifically referenced Dr. McGinty's opinion that "the services offered by JCPS are limited, and that [S.J.R.] would be better served by Meredith Dunn or a similar school." Dr. McGinty had worked with special needs students in JCPS for fifteen years, and she was familiar with JCPS's processes and services. While the family court indicated that a transition to JCPS should be explored in the future, I believe there was sufficient proof in the record in the form of Dr. McGinty's opinion as well as Dr. Church's recommendation that JCPS would not be able to meet S.J.R.'s immediate educational needs and that a specialized school was necessary at this juncture to do so. All of the specialized schools recommended by the counselors, physicians, and psychologists were private, tuition-based schools.

In my opinion, Warken met her burden based on the testimony of Dr. McGinty and the other teachers, physicians and experts, of placing some proof in the record that JCPS was not able to meet S.J.R's present educational needs. The failure in this case was not a failure by Warken or the family court. If there was a failure, it was Ridgeway's failure to present any rebuttal proof. He could have

presented generalized proof regarding JCPS's services and abilities to meet S.J.R.'s needs. Instead, he failed to do so, and actually appeared to know very little about the process.

In sum, I believe *Miller's* minimal requirements were satisfied in this case. Some evidence was presented to the family court that JCPS would not be able to meet S.J.R.'s immediate educational needs. Ridgeway did not meet his burden of rebutting this evidence. Accordingly, I would affirm the family court.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
Sarah S. Almy Louisville, Kentucky	Rebecca M. Simms Louisville, Kentucky